



Entered

JUN 25 1969

F 2302

San Francisco Law Library

436 CITY HALL


No. 192706..

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 3a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

NO.

21676 ✓

3442

V. 3442

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE CHABOLLA-DELGADO,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITIONER'S OPENING BRIEF

DAVID C. MARCUS
Attorney at Law
215 West Fifth Street
Los Angeles, California 90013

Telephone: 628-4788

Attorney for Petitioner

FILED

JUN 30 1967

WM. B. LUCK, CLERK

COPY

JUL 3 1967

1 NO.

2 21676

3 IN THE
4 UNITED STATES COURT OF APPEALS
5 FOR THE NINTH CIRCUIT
6
7

8 JOSE CHABOLLA-DELGADO,

9 Petitioner,

10 vs.

11 IMMIGRATION AND NATURALIZATION SERVICE,

12 Respondent.
13
14
15

16 PETITIONER'S OPENING BRIEF
17
18
19
20

21 DAVID C. MARCUS
Attorney at Law

22 215 West Fifth Street
23 Los Angeles, California 90013

24 Telephone: 628-4788

25 Attorney for Petitioner
26

TOPICAL INDEX

Page

JURISDICTION

1

STATEMENT OF FACTS

1

POINTS RELIED UPON

4

ARGUMENT AND AUTHORITIES

5

CONCLUSION

18

TABLE OF AUTHORITIES CITED

Cases

Page

Adams v. United States, 299 F. 2d 327	12
Arrellano-Flores v. Hoy, 262 F. 2d 667	6, 10, 11, 12, 13, 16, 17
Barber v. Gonzales, 347 U.S. 637	14-15
Carmichael v. Delaney, 170 F. 2d 239	15
Delgadillo v. Carmichael, 332 U.S. 388	14
Garcia-Gonzales v. Immigration and Naturalization Service, 344 F. 2d 804	10, 11
Hernandez-Valensuela v. Rosenberg, 304 F. 2d 639	12
Hoy v. Mendoza-Rivera, 267 F. 2d 451	7-8
Hoy v. Rojas-Gutierrez, 267 F. 2d 490	8-9
Kelly v. Immigration and Naturalization Service, 349 F. 2d 473	11, 17
Sherman v. Immigration Service, 17 L ed 362	17
Tan v. Phelan, 333 U.S. 6	13-14
Woodby v. Immigration Service, 17 L ed 362	17
Zabanazad v. Rosenberg, 306 F. 2d 861	12

Statutes

8 U.S.C. § 1251(a)(11)	5-6, 7, 9, 11, 12
18 U.S.C. § 1407	12
Public Law 86-648	9

1 Cal. Health & Saf. Code,

2 § 11500 10

3 § 11501 10

4 § 11531 11

5 Cal. Pen. Code

6 § 1203.4 10, 11

7
8 Constitutions

9 United States Const., Amend. VIII 17

10
11 Decisions

12 In the Matter of Arrellano-Flores,
13 8 I & N Dec. 429 6

1 NO. 21676

2 IN THE
3 UNITED STATES COURT OF APPEALS
4 FOR THE NINTH CIRCUIT

5 JOSE CHABOLLA-DELGADO,

6 Petitioner,

7 vs.

8 IMMIGRATION AND NATURALIZATION SERVICE,

9 Respondent.

10
11

PETITIONER'S OPENING BRIEF

12
13
14 JURISDICTION

15
16 Jurisdiction is invoked under the provisions of
17 106(a) of the Immigration and Nationality Act, as amended,
18 and Section 1105(a) of Title 8 U.S.C.
19

20 STATEMENT OF FACTS

21 Petitioner, thirty-three years of age, a native
22 and citizen of Mexico, was admitted to the United States
23 on November 28, 1960. Petitioner's wife is a United States
24 citizen and there are four native born United States citizen
25 children issue of this marriage, all of whom are wholly
26 dependent upon him for support. (C.A.R. pp. 28-19*.)

1.

* Certified Administrative Record

1 In an information filed by the District Attorney
2 of Los Angeles County, petitioner was charged on March 2,
3 1965, in the Superior Court of Los Angeles County, with
4 a violation of section 11530 of the Health and Safety Code
5 of the State of California, to wit, possession of marijuana.
6 (C.A.R. p. 59; Exhibit 3.)

7 On June 16, 1965, a trial of said proceedings was
8 had and the court made the following findings:

9 ". . . . Court finds Defendant 'Guilty', as
10 charged. A Probation Officer's report is
11 ordered. Further proceedings and motion for a
12 new trial, continued to July 8, 1965, 9 A.M.
13 Time waived. Remain on bail." (C.A.R. p. 60.)

14 On August 31, 1965, the said superior court made
15 and entered the following order:

16 ". . . . Defendant's motion for a new trial is
17 withdrawn. Proceedings suspended. Probation
18 granted for four years. . . . Pay fine of \$250.00
19 through Probation Officer in such manner as such
20 officer shall prescribe plus penalty assessment.
21 Abstain from all alcoholic beverages and stay out
22 of places where they are the chief item of sale.
23 Not use or possess any narcotics or narcotic para-
24 hernalia and stay away from places where addicts
25 congregate. Not associate with known narcotic users
26 of sellers. Seek and maintain employment as

1 approved by Probation Officer. Support dependents
2 as directed by Probation Officer. Maintain residence
3 as approved by Probation Officer. Obey all laws,
4 orders, rules and regulations of Probation Depart-
5 ment and of the Court." (C.A.R. p. 61.) (Emphasis added.)

6 On April 18, 1966, respondent Immigration and
7 Naturalization Service caused an Order to Show Cause, and
8 Notice of Hearing and Deportation Proceedings to be issued
9 charging petitioner, a citizen and native of Mexico, with
10 being subject to deportation under the provisions of 241(a)
11 (11) of the Immigration and Nationality Act, in that he had
12 been convicted of a violation of law relating to elicit
13 possession of marijuana in violation of section 11530 of the
14 Health and Safety Code of the State of California, in that
15 he had, on June 16, 1965, in the Superior Court of the
16 State of California been convicted of the offense of unlaw-
17 ful possession of marijuana in violation of section 11530
18 of the Health and Safety Code of the said state. (C.A.R.
19 p. 38.) Hearings were conducted before said Service on
20 May 5, 1966, May 12, 1966, and August 2, 1966. (C.A.R. pp.
21 16-37.) On September 30, 1966, the Special Inquiry Officer
22 made and entered his decision, finding that the petitioner
23 had been found guilty of a violation of section 11530 of
24 the Health and Safety Code of the State of California on
25 August 31, 1965, that petitioner was a deportable alien
26 under the provisions of section 241(a)(11) of the

1 Immigration and Nationality Act, and ordered his deportation
2 from the United States, and further found that petitioner
3 was ineligible for any relief either statutory or discre-
4 tionary. (C.A.R. pp. 13-15.)

5 An appeal was duly perfected to the Immigration
6 Board of Appeals, and on January 9, 1967, the decision of
7 the Board affirmed the decision of the Special Inquiry
8 Officer and dismissed the appeal. (C.A.R. pp. 2-4.) The
9 petitioner was ordered by the Immigration Service to sur-
10 rendered on March 15, 1967. The Petition for Judicial Review
11 was filed with this Court on or about March 15, 1967, to
12 review the actions of the Immigration Service in ordering
13 the deportation of the petitioner from the United States.
14

15 POINTS RELIED UPON

16 1. Petitioner is not a deportable alien.

17 2. Petitioner was not convicted of a crime sub-
18 jecting him to deportation.

19 3. The order of deportation is not predicated
20 upon clear, convincing, and unequivocal proof.

21 4. The deportation of the petitioner is cruel
22 and inhuman punishment, in violation of the Eighth Amendment
23 of the Constitution of the United States.

24 5. Petitioner has not been convicted of any law,
25 rule, or regulation relating to the illicit possession or
26 traffic in marijuana as defined by Title 8, 1251(a)(11)

1 of the Immigration and Nationality Act.

2
3 ARGUMENT AND AUTHORITIES

4 Petitioner was charged with being a deportable
5 alien under the provisions of section 1251 of Title 8, U.S.C.,
6 which reads in part as follows:

7 "(a) Any alien in the United States (including
8 an alien crewman) shall, upon the order of the
9 Attorney General, be deported who --

10

11 "(11) is, or hereafter at any time after entry
12 has been, a narcotic drug addict, or who at any time
13 has been convicted of a violation of, or a conspiracy
14 to violate, any law or regulation relating to the
15 illicit possession of or traffic in narcotic drugs
16 or marijuana, or who has been convicted of a vio-
17 lation of, or a conspiracy to violate, any law
18 or regulation governing or controlling the taxing,
19 manufacture, production, compounding, transportation,
20 sale, exchange, dispensing, giving away, importa-
21 tion, exportation, or the possession for the purpose
22 of the manufacture, production, compounding, trans-
23 portation, sale, exchange, dispensing, giving away,
24 importation, or exportation of opium, coca leaves,
25 heroin, marijuana, any salt derivative or prepara-
26 tion of opium or coca leaves or isonipecaine or

1 any addition-forming or addiction-sustaining
2 opiate;"

3 Petitioner herein was found guilty of simple
4 possession of marijuana. After the finding of guilt, his
5 proceedings were suspended, he was fined \$250.00 and place
6 on probation for a period of four years, with other specific
7 provisions of his probationary order dated August 31, 1965.
8 No jail sentence was imposed. This probationary order is
9 still effective and petitioner is within the supervisory
10 power of the Superior Court of the State of California for
11 Los Angeles County.

12 The Special Inquiry Officer and the Board of
13 Immigration Appeals determined that the instant case was
14 governed by the decision of this Court in Arrellano-Flores
15 v. Hoy, (9th Cir. 1958) 262 F. 2d 667 (In the Matter of
16 Arrellano-Flores, 8 I & N Dec. 429).

17 It is to be noted that there is a clear factual
18 distinction between the instant matter and the Arrellano-
19 Flores case, supra, for, as Circuit Judge Chambers indicated
20 in his opinion, Flores was

21 ". . . found guilty after a California trial on
22 a criminal charge that he unlawfully sold
23 marihuana, a substance classified as a narcotic."
24 262 F. 2d 667.

25 Section 1251(a)(11) in effect at the time of the
26 Arrellano-Flores decision provided that an alien is

1 deportable who at any time after entry "has been convicted
2 of a violation of . . . any law . . . governing the . . .
3 sale . . . of . . . marihuana" This distinction be-
4 tween sale and possession of marijuana as grounds for depor-
5 tation under the then existing statute (8 U.S.C. 1251(a)(11))
6 is forceably dealt with in the matter of Hoy v. Mendoza-
7 Rivera, (9th Cir. 1959) 267 F. 2d 451, wherein Mendoza-Rivera,
8 a Mexican alien convicted in the state court of possession
9 of marijuana and sentenced to ninety days in jail. After
10 proceedings based upon this state conviction he was ordered
11 deported from the United States. This Court held under the
12 amended statute, effective July 18, 1956:

13 ". . . . When the words 'conspiracy to violate'
14 and 'possession of' were added by amendment to
15 the first clause of the Act, so that for the first
16 time a person was subject to deportation because of
17 a conviction for the offense of illicit possession
18 of narcotic drugs, and the second provision,
19 permitting deportation of any person convicted of
20 offenses relating to enumerated drugs including
21 marijuana, which originally and as amended contained
22 the words 'governing * * * the possession for the
23 purpose of the manufacture, production, compounding,
24 transportation, sale, exchange, dispensing, giving
25 away, importation, or exportation of * * * marijuana'
26 and which remained unchanged except for the addition

1 of the words 'or a conspiracy to violate,' the
2 intention drawn from the amendment to the text
3 clearly is that conviction of possession [sic]
4 of a narcotic drug is sufficient, but that
5 'possession for the purpose of the manufacture,
6 production, compounding, transportation, sale,
7 exchange, dispensing, giving away, importation,
8 or exportation of * * * marijuana' was needed before
9 a person could be deported under the section.
10 Mendoza-Rivera was only convicted of simple
11 possession of marijuana. He does not fall in the
12 ambit of the enactment." 267 F. 2d 451, 452.

13 See also, Hoy v. Rojas-Gutierrez, (9th Cir. 1959) 267 F. 2d
14 490, wherein this Court ruled:

15 "Arnulfo Rojas-Gutierrez was ordered deported
16 to Mexico after a hearing on October 19, 1956.
17 He had been previously convicted in the California
18 state courts on March 11, 1938, November 13, 1945,
19 and April 8, 1949, each time for having had in
20 his possession the flowering tops and leaves of
21 Indian Hemp (*Cannabis Sativa* Marijuana). These
22 offenses constituted the sole ground for the order.

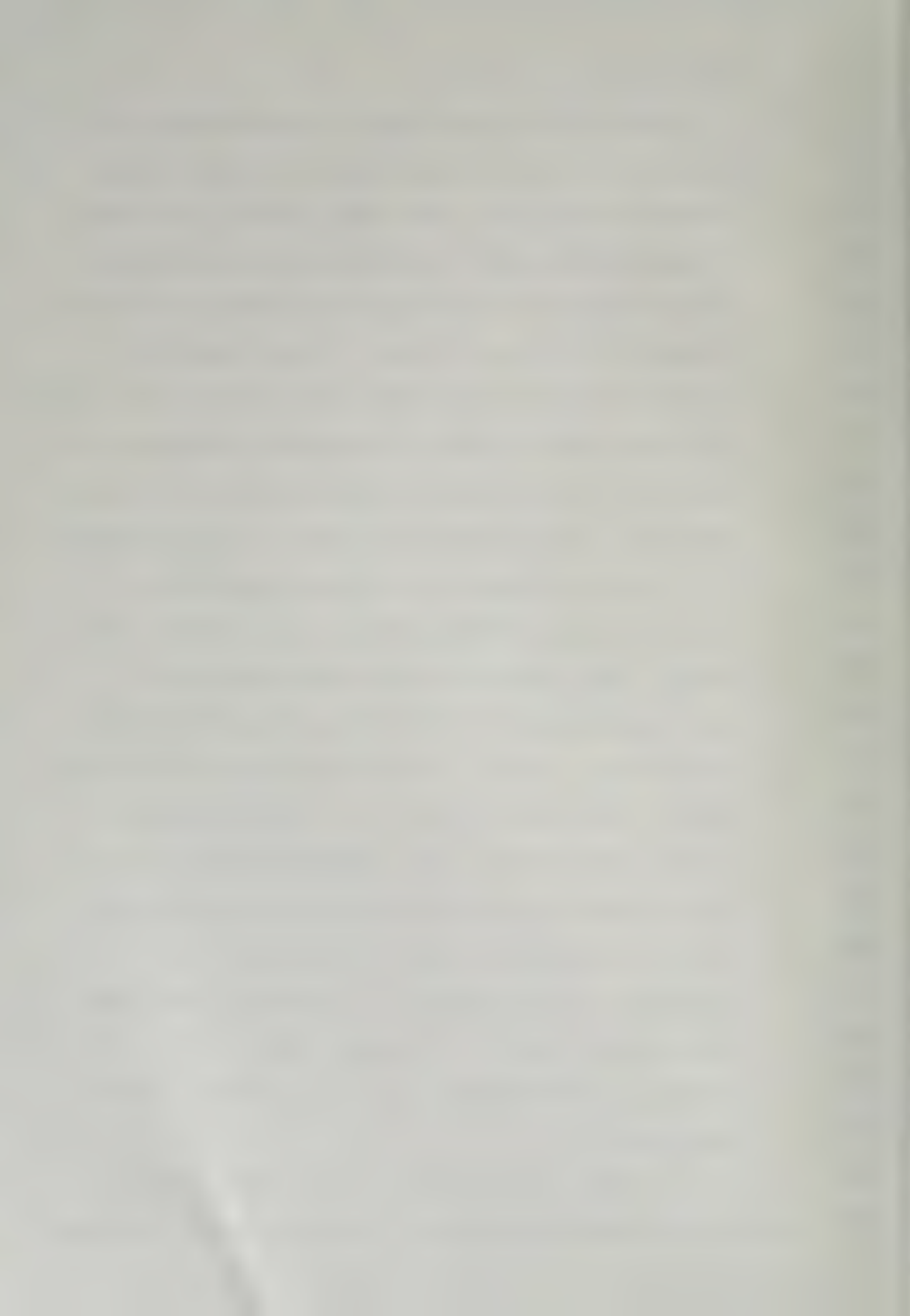
23 "Previously, he had been subject of deportation
24 proceedings on the ground that he had been convicted
25 of the crime of burglary before his entry into the
26 United States. The hearing terminated by a finding

1 in his favor.

2 "After the present order of deportation, he
3 initiated a suit in the nature of a declaratory
4 judgment proceeding. The sole cause of the order
5 of deportation lies in the provisions of Section
6 241(a)(11) of the Immigration and Nationality Act
7 of 1952 (8 U.S.C.A. § 1251). There were not
8 issues of fact in the declaratory judgment proceeding.
9 The trial court issued a declaratory judgment to
10 the effect that Arnulfo Rojas-Gutierrez was not de-
11 portable. The District Director took this appeal.

12 "The sole question is whether appellee is
13 subject to deportation because he has been found
14 guilty under the California state statutes of
15 simple possession of marijuana. This Court has
16 ruled today, in Hoy, District Director v. Mendoza-
17 Rivera, 267 F.2d 451 that the statute does not
18 include such cases. The District Judge in this
19 case purported to follow the Mendoza-Rivera hold-
20 ing in the District Court. Nevertheless, the
21 authority of Judge Mathes strengthens that posi-
22 tion, and we find it in accord with our own
23 thinking. Rojas-Gutierrez v. Hoy, D.C., 161 F.
24 Supp. 448."

25 In 1960, Section 1251(a)(11) was amended by
26 Public Law 86-648 by inserting "or marijuana" following



1 "narcotic drugs." The amended statute is set forth, supra,
2 verbatim.

3 In Garcia-Gonzales v. Immigration & Nat. Service,
4 (9th Cir. 1965) 344 F. 2d 804, this Court affirmed the order
5 of deportation of an alien who had been convicted of a
6 violation of section 11500 and section 11501 of the California
7 Health and Safety Code. Section 11500 of the California
8 Health and Safety Code provides that every person who
9 possesses any narcotic "other than marijuana" is guilty of
10 a felony and shall be punished by imprisonment in a state
11 prison for not less than two years nor more than ten years.
12 (Cal. Health and Safety Code § 11500.) Section 11501 of
13 the same Code provides that any person who transports,
14 imports into this state, sells, furnishes, administers, or
15 gives away, or offers to transport, import into this state,
16 sell, furnish, administer, or give away "any narcotic other
17 than marijuana . . . shall be punished by imprisonment in
18 the state prison from five years to life. . . ." (Cal.
19 Health & Safety Code § 11501.) The alien's conviction was
20 expunged under California law pursuant to the provisions
21 of section 1203.4 of the Penal Code of the State of
22 California. The court held, citing Arrellano-Flores v.
23 Hoy, (9th Cir. 1958) 262 F. 2d 667, that expungement of
24 the conviction of the unlawful possession, transportation,
25 and sale of heroin did not expunge the record upon which
26 the deportation order rested.

1 In the recent case of Kelly v. Immigration and
2 Naturalization Service, (9th Cir. 1965) 349 F. 2d 473,
3 petitioner was charged with being a deportable alien under
4 8 U.S.C. § 1251(a)(11) after a conviction and sentence by
5 the courts for violation of section 11531 of the California
6 Health and Safety Code, which section provided as follows:

7 "Every person who transports, imports into this
8 State, sells, furnishes, administers or gives away,
9 or offers to transport, import into this State,
10 sell, furnish, administer, or give away, or
11 attempts to import into this State or transport
12 any marijuana shall be punished by imprisonment in
13 the state prison from five years to life and
14 shall not be eligible for release upon completion
15 of sentence, or on parole, or on any other basis
16 until he has served not less than three years."

17 His conviction was expunged under section 1203.4 of the
18 California Penal Code. This Court, citing Garcia-Gonzales
19 v. Immigration & Nat. Service, supra, and Arrellano-Flores
20 v. Hoy, supra, as authority, determined that expungement
21 did not wipe out the record of conviction and that the
22 alien was nevertheless deportable. Circuit Judge Ely
23 dissented.

24 It is to be noted, therefore, that the entire
25 treatment and prevailing opinion respecting the Court's
26 interpretation of Section 1251(a)(11) of Title 8 U.S.C.

1 was born from the nucleae of Arrellano-Flores v. Hoy, supra.
2 Circuit Judge Chambers, the author of the opinion, stated:

3 "While one cannot close one's eyes to the state's
4 statutes and what transpired in the state's proceed-
5 ings, we are inclined to the belief that perhaps
6 here Congress intended to do its own defining rather
7 than leave the matter to the variable state statutes.
8 . . . " 262 F. 2d 667, 668.

9 Under the impact of Arrellano-Flores, this Court
10 determined in Hernandez-Valensuela v. Rosenberg (9th Cir.
11 1962) 304 F. 2d 639, that a youth committed under the
12 Federal Youth Commission Act, under which his conviction as
13 a youth offender was automatically set aside upon his dis-
14 charge, did not have the effect of rendering his conviction
15 not final. In Zabanazad v. Rosenberg (9th Cir. 1962) 306
16 F. 2d 861, the alien was a youth offender committed to the
17 California Youth Authority. This Court affirmed his depor-
18 tation under the provisions of Section 1251(a)(11). In
19 Adams v. United States (9th Cir. 1962) 299 F. 2d 327, the
20 defendant was found guilty in the Superior Court of the
21 State of California for possession of marijuana in viola-
22 tion of Section 11500 of the Health and Safety Code and
23 committed to the Youth Authority. This Court held that
24 he had been convicted within the meaning of 18 U.S.C. §
25 1407 and was deportable under the provisions of Section
26 1251(a)(11)

1 The nebulous language of Arrellano-Flores v. Hoy,
2 supra, wherein this Court stated that "we are inclined to
3 the belief that perhaps here Congress intended to do its
4 own defining rather than leave the matter to the variable
5 state statutes" has been enlarged to meet the variety of
6 cases never intended or encompassed by Arrellano, but used
7 as authority. We believe that this same Court should now
8 reappraise Arrellano in light of the enlightening recent
9 opinions from the Supreme Court of the United States which
10 interpret the Immigration Act and the burden and the quality
11 of evidence required in deportation proceedings.

12 Although deportation proceedings are civil in their
13 nature, the consequences of the deportation can be more
14 serious and exacting a greater penalty than the conviction
15 of a crime.

16 In Tan v. Phelan (1947) 333 U.S. 6, the Supreme
17 Court was called upon to give statutory construction in-
18 volving the deportation of an alien sentenced more than
19 once for a term of one year or more because of conviction
20 of a crime involving moral turpitude committed after his
21 entry. The Supreme Court, in reversing this Circuit, stated:

22 "We resolve the doubts in favor of that con-
23 struction because deportation is a drastic measure
24 and at times the equivalent of banishment or exile,
25 Delgadillo v. Carmichael, 332 US 388, ante, 17,
26 68 S Ct 10. It is the forfeiture for misconduct

1 of a residence in this country. Such a forfeiture
2 is a penalty. To construe this statutory provision
3 less generously to the alien might find support
4 in logic. But since the stakes are considerable
5 for the individual, we will not assume that Congress
6 meant to trench on his freedom beyond that which
7 is required by the narrowest of several possible
8 meanings of the words used." 333 U.S. 6, 10.

9 In Delgadillo v. Carmichael (1944) 332 U.S. 388,
10 cited as authority in Tan v. Phelan, supra, Justice Douglas
11 writing, the Supreme Court reversed this Circuit, as follows:

12 "Deportation can be the equivalent of banishment
13 or exile. See Bridges v. Wixon, 326 US 135
14 The stakes are indeed high and momentous for the
15 alien who has acquired his residence here. We
16 will not attribute to Congress a purpose to make
17 his right to remain here dependent on circumstances
18 so fortuitous and capricious as those upon which
19 the Immigration Service has here seized. The
20 hazards to which we are now asked to subject the
21 alien are too irrational to square with the
22 statutory scheme." 332 U.S. 388, 391.

23 In Barber v. Gonzales (1953) 347 U.S. 637, Justice
24 wrote:

25 ". . . . Although not penal in character, depor-
26 tation statutes as a practical matter may inflict

1 'the equivalent of banishment or exile,'
2 Fong Haw Tan v. Phelan, 333 US 6, 10. . . , and
3 should be strictly construed. See Delgadillo
4 v. Carmichael, 332 US 388, 391. . . . In the
5 absence of explicit language showing a contrary
6 congressional intent, we must give technical
7 words in deportation statutes their usual
8 technical meaning." 347 U.S. 637, 642-643.

9 In Carmichael v. Delaney (9th Cir. 1948) 170 F.
10 2d 239, this Court held:

11 "Throughout history banishment or exile
12 has been looked upon as a penalty little less
13 dreadful than death. To one in appellee's
14 situation exclusion is in substance and practical
15 effect the equivalent of banishment. It involves
16 the same severance from home and existing ties
17 that the individual suffers who is expelled from
18 the country in a proceeding to deport. There
19 is no difference in their loss of freedom of
20 movement or in the nature of the hardships they
21 are called upon to undergo. The sole distinction
22 resides in the mere matter of nomenclature. The
23 distinction, we think, is of no moment insofar
24 as concerns the Constitutional guaranty of
25 due process of law." 170 F. 2d 239, 245.

26 How true this language when made applicable to the

instant proceedings. The alien with a wife and four children, citizens of the United States, is banished for life, separated from his family, home, friends, and surroundings. This, indeed, is punishment worse than death, though inflicted under the guise of civil processes in deportation proceedings.

The criminal penalty for this offense was a fine of \$250.00 and probation, with no term of imprisonment. The effect of these deportation proceedings is punishment far greater, more serious, harsh, and cruel than the actual penalty for the commission of the crime itself.

It appears that it is now an appropriate time to exercise some restraint upon the interpretation given Arrellano. It does not seem to measure with due administration of justice that a person who is found guilty of or convicted of possession of a small amount of marijuana, given probation and a minimum fine, with some regulatory conditions of probation, should be subjected to cruel and inhuman exactions of the law, that he should be banished and barred from his family, children, home and surroundings for life. This does not square with the traditional American policy of fairness and even-handed justice.

It is the petitioner's contention, therefore, that no matter by what process, whether criminal or civil, the exaction of banishment with all its consequences is cruel and inhuman under the circumstances of this case, and a

1 violation of the Eighth Amendment of the United States
2 Constitution.

3 In Woodby v. Immigration Service and Sherman
4 v. Immigration Service, 17 L ed 362, 369, decided December
5 12, 1966, the Court, speaking through Justice Stewart,
6 determined:

7 "We hold that no deportation order may
8 be entered unless it is found by clear,
9 unequivocal, and convincing evidence that the
10 facts alleged as grounds for deportation are
11 true. Accordingly, in each of the cases before
12 us, the judgment of the Court of Appeals is set
13 aside, and the case is remanded to those courts
14 with directions to remand to the Immigration and
15 Naturalization Service for such further proceed-
16 ings as, consistent with this opinion, it may
17 deem appropriate."

18 Indeed, the Arrellano-Flores case opinion, and its
19 later satellites, leaves considerable to be desired in the
20 light of Woodby and Sherman, supra, and lends further
21 dignity and support to the eloquent dissenting opinion
22 of Judge Ely in Kelly v. Immigration and Naturalization
23 Service, supra.

1
2 CONCLUSION

3 Petitioner respectfully requests that the proceed-
4 ings be remanded with directions to annul the order of
5 deportation.

6 Respectfully submitted,

7
8 David C. Marcus
9 DAVID C. MARCUS

10 Attorney for Petitioner
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ss

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of 18 years and not a party to the within entitled action; my business address is 215 West Fifth Street, Chester Williams Building, Suite 223, Los Angeles, California.

On June 21, 1967 I served the within Petitioner's Opening Brief and Affidavit on the respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Honorable Matthew Byrne, Jr.
United States Attorney
6th Floor - United States Courthouse
Los Angeles, California

United States Department of Justice
Immigration and Naturalization Service
300 North Los Angeles Street
Los Angeles, California

Kay Ventile
KAY VENTILE

Subscribed and sworn to before me
this 21st day of June, 1967.

Mildred S. Barnes
Mildred S. Barnes, Notary Public



My Commission Expires August 13, 1971

NO. 21677

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAVERN SPEER,
CHAMPLAIN McCREA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FILED

NOV 6 1967

WM. B. LUCK, CLERK

EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America

NO. 21677

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAVERN SPEER,
CHAMPLAIN McCREA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,

TOPICAL INDEX

	<u>Page</u>
I JURISDICTIONAL STATEMENT	1
II STATEMENT OF THE CASE	2
III ERROR SPECIFIED	2
IV STATEMENT OF THE FACTS	4
V ARGUMENT	7
A. THERE IS NO SHOWING THAT DEFENSE COUNSEL WAS INCOMPETENT.	7
1. The Question of Alleged Conflict of Interest	10
2. The Question of Severance.	11
3. Failure to Request Pretrial Disclosure.	12
4. Failure to Object to Questioning By The Prosecutor.	13
5. Failure to Object to Statements by Appellant McCrea.	14
6. Failure to Move for Judgment of Acquittal as to Appellant Speer.	14
7. Failure to Move For Judgment of Acquittal as to Appellant McCrea.	16
8. The Offer of the Overcoat in Evidence.	16
9. Failure to Object to Alleged Misconduct.	17
10. Failure to Request an Instruction Relating to Appellant McCrea's Extra-Judicial Statement.	18
B. THE COURT WAS NOT REQUIRED TO GRANT A JUDGMENT OF ACQUITTAL UPON ITS OWN MOTION IN THE CASE OF APPELLANT SPEER.	18
C. THE COURT WAS NOT REQUIRED TO GRANT A JUDGMENT OF ACQUITTAL UPON ITS OWN MOTION IN THE CASE OF APPELLANT MCCREA.	19

TOPICAL INDEX (continued)

	<u>Page</u>
D. THE TRIAL COURT'S RULING UPON AN OBJECTION TO INSPECTOR RAMSEY'S TESTIMONY DID NOT CONSTITUTE ERROR.	19
E. THE TRIAL COURT DID NOT COMMIT ERROR BY FAILING TO INSTRUCT THE JURY TO DISREGARD McCREA'S EXTRA-JUDICIAL STATEMENT IN SPEER'S CASE.	19
F. THE PROSECUTING ATTORNEY DID NOT COMMIT MIS-CONDUCT IN HIS CLOSING ARGUMENT.	20
VI CONCLUSION	20
CERTIFICATE	21

TABLE OF AUTHORITIES

Cases	<u>Page</u>
Achtien v. Dowd, 117 F.2d 989 (7th Cir. 1941)	7
Aguilar v. United States, 363 F.2d 379,381 (9th Cir. 1966)	13
Alexander v. United States, 362 F.2d 379,383 (9th Cir. 1966)	12
Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962)	9
Benson v. State Board of Parole & Probation, et al, 9th Cir., October 23, 1967, No. 21,528	10
Chavira Gonzales v. United States, 314 F.2d 750,752 (9th Cir.1963)	10
Cook v. United States, 354 F.2d 529,531 (9th Cir. 1965)	12
Dodd v. United States, 321 F.2d 240,243 (9th Cir. 1963)	8
Doherty v. United States, 318 F.2d 719 (9th Cir.1963)	15
Eason v. United States, 281 F.2d 818 (9th Cir.1960)	15
Garibay-Garcia v. United States, 362 F.2d 509 (9th Cir.1966)	12
Gonzales v. United States, 301 F.2d 31 (9th Cir. 1962)	15
Hurst v. United States, 344 F.2d 327,328 (9th Cir. 1965)	12
Johnson v. New Jersey, 384 U. S. 719,734 (1966)	14
Jones v. United States, 326 F.2d 124,127,129 (9th Cir.1963)	12

Table of Authorities (continued)

	<u>Page</u>
King v. United States, 348 F.2d 814,819 (9th Cir.1965), cert. denied, 382 U.S. 926 (1965)	12
Kramer v. United States, 147 F.2d 202 (9th Cir.1945)	19
Lugo v. United States, 350 F.2d 858,859 (9th Cir.1965)	10
Miranda v. Arizona, 384 U. S. 436 (1966)	14
Mitchell v. United States, 259 F.2d 787 (C.A.D.C. 1958)	8
Peek v. United States, 321 F.2d 934 (9th Cir.1963), cert. denied, 376 U. S. 954 (1964)	11
Rivera v. United States, 318 F.2d 606,608 (9th Cir.1963)	12
Smith v. United States, 9 F.2d 386,387 (9th Cir. 1925)	12
Washington v. United States, 297 F.2d 342 (9th Cir.1961)	8

Statutes

Title 18, United States Code, Sections 545 and 3231	1
Title 28, United States Code, Sections 1291 and 1294	1

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAVERN SPEER,
CHAMPLAIN McCREA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellants to be guilty as charged in both counts of a two-count indictment following trial by jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 545 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellants were charged in each count of a two-count indictment returned by the Federal Grand Jury for the Southern District of California. The first count alleged that appellants, with intent to defraud the United States, knowingly and wilfully smuggled approximately 1470 amphetamine tablets into the United States from Mexico ^{1/} [C.T.2].

The second count alleged that appellants fraudulently and knowingly concealed, and facilitated the transportation and concealment of approximately 1470 amphetamine tablets, which merchandise, as they then and there well knew, had been imported and brought into the United States contrary to law [C.T.3].

Jury trial of appellants commenced on June 7, 1966, before United States District Judge Roger T. Foley [C.T.5]. Appellants were found guilty as charged in both counts on June 8, 1966 [C.T. 7-8].

Thereafter, on June 23, 1966, each appellant was committed to the custody of the Attorney General for three years upon each count, to run concurrently [C.T. 9-10]. Each appellant subsequently filed a timely notice of appeal [C.T. 11-12].

III

ERROR SPECIFIED

Appellants' opening brief specifies the following points upon appeal:

^{1/}
"C. T." refers to the Clerk's Transcript of Record.

"A. Neither defendant received a fair trial in that each should have been represented by separate counsel; and counsel's representation was so ineffective as to reduce trial of defendants to a farce or sham.

"1. Trial counsel apparently failed to recognize an obvious conflict of interest between the defendants, to advise the court of such conflict, and to request that defendants be afforded representation by independent counsel.

"2. Counsel for defendants failed to move for a severance and for separate trials of the defendants.

"3. Counsel for defendants failed to move for a bill of particulars for disclosure prior to trial of evidence regarding an informer, or his communication, for evidence favorable to the defendants, and for disclosure of any statements made by the defendants which the prosecution intended to introduce.

"4. Counsel for defendant failed to object to leading questions by the prosecutor.

"5. Counsel for defendants failed to object to the admission of the inadmissible statements made by defendant McCrea.

"6. Counsel failed to move for a judgment of acquittal at the close of the government's case.

"7. Counsel for defendants offered the overcoat into evidence which was highly prejudicial to defendant McCrea.

"8. Counsel for defendants failed to object to prosecuting attorney's misconduct in closing argument.

"9. Counsel failed to request an instruction that the jury disregard McCrea's extra-judicial statement in determining the guilt of Speer.

"B. The court below erred in failing to grant a judgment of acquittal on its motion at the close of the government's case as to defendant Speer.

"C. The court below erred in failing to grant a judgment of acquittal on its own motion as to both defendants at the close of the government's case.

"D. The court below erred in sustaining an objection to defense counsel's question directed to government witness Ramsey as to whether Ramsey knew whether the pills were in the car prior to entering Mexico.

"E. The court below erred in failing to instruct jury to disregard McCrea's extra-judicial statement as against defendant Speer.

"F. Misconduct of the prosecuting attorney in closing argument was prejudicial to the defendants."

[Appellants' Opening Brief, pp. 4-5].

IV

STATEMENT OF THE FACTS

Appellants McCrea and Speer entered the United States from Mexico in an automobile at San Ysidro, California, on April 2, 1966 [R.T. 8,16,69]^{2/}. Appellants declared some merchandise to a Customs officer but declared no

^{2/}

"R.T. refers to the Reporter's Transcript of Proceedings.

amphetamine [R.T. 17,22,30,69]. Appellant McCrea was driving the vehicle. Appellant Speer was the only other occupant [R.T. 16-17, 58-59].

Customs Inspector Donald C. Ramsey found two paper bags in the pocket of an overcoat in the trunk compartment of the vehicle. The coat was underneath other clothing and other items. One paper bag contained 710 amphetamine tablets, and the other one contained 720 amphetamine tablets, according to Inspector Ramsey's best recollection [R.T. 7-8, 18-20,47]. The overcoat was too big to fit appellant Speer properly. Its size was "just right" for appellant McCrea [R.T. 31,53].

Appellant McCrea stated that he could not have bought the pills because he had no money. He said that he and Speer came down for a good time and that Speer financed the venture [R.T. 52,59-61].^{3/}

Appellant Speer had about \$75 in his possession. He admitted that he had paid the expenses of the trip across the border. In reference to appellant McCrea, Speer stated:

"I even paid for his girl because I had all the money" [R.T. 52,60-61].^{4/}

Appellant McCrea testified during the trial and stated that the trip was made in his own vehicle; that the idea of taking the trip probably originated

^{3/}

The witness appeared to be confused concerning the identity of the defendants and originally attributed McCrea's statements to Speer [R.T. 52, 59,61]

^{4/}

Here again the witness was confused in his testimony and subsequently corrected it [R.T. 52,61].

with both appellants; that he had not had any money since March 3; that Speer had agreed to pay the expenses of the trip; that they had left Los Angeles at about four o'clock; that they crossed the border into Mexico between 7 p.m. and 8 p.m.; that they went to two or three night clubs; that they went to a cab driver who took them to a building which had some girls; and that they went to the Black Cat and then to the Chicago Club [R.T. 65-68,78, 90-91].

Appellant McCrea also testified that they headed back toward the border with two Marines in the car; that they stopped at a liquor store, where Speer bought some liquor; that Speer stated (apparently in reference to one of the bottles): "Let's not break it until we get through the fence"; and that he, McCrea, told the Marines to walk across the border "and we would pick them up on the other side." [R.T. 69,86,88].

He also testified that the overcoat was not in the vehicle when the trip to Mexico commenced; that the two Marines had sat in the vehicle outside of the Chicago Club for about two hours, playing the radio; that the Marines had to have access to the car keys in order to use the radio; that the ignition key was not the key for the trunk; and that one can get into the trunk from the back seat by removing the shelf panel between the back seat and the window [R.T. 71-73,76].

Appellant McCrea testified that he did not know that the amphetamine tablets were in the vehicle; that he would have fled had he known that they were there; and that he had been convicted of two or three felonies. He strongly implied that appellant Speer was innocent [R.T. 70-72, 74-76].



Appellant Speer testified regarding the trip to Tijuana and provided a narrative similar to that of McCrea [R.T. 97-99, 101, 114-17]. He testified that he was innocent; that he had never seen the overcoat before; that he agreed to pay McCrea's expenses on the trip; that he was unable to drive an automobile; and that he had three felony convictions [R.T. 102, 105-06, 108, 110].

The trial Judge commended counsel for appellants after the verdict was rendered:

"I want to say now that I think Counsel for the defendants did everything that counsel for the defendants could be expected to do and Counsel for the Government was very fair in his presentation of the case." [R.T. 190].

V

ARGUMENT

A. THERE IS NO SHOWING THAT DEFENSE COUNSEL WAS INCOMPETENT.

Appellants contend that their counsel at trial "was so ineffective as to reduce trial of defendants to a farce or sham." (Appellants' Opening Brief, p.4). In support of this assertion, appellants cite various asserted errors by counsel, ranging from failure to object to alleged leading questions to failure to recognize an alleged conflict of interest.

There is a presumption of competency of counsel.

Achtien v. Dowd, 117 F.2d 989, 992 (7th Cir. 1941).

In order to prevail in a claim of incompetency of counsel, an appellant must

show that the trial was "'a mockery of justice, shocking to the conscience of the court.'"

Dodd v. United States, 321 F.2d 240,243 (9th Cir. 1963), quoting from Washington v. United States, 297 F.2d 342 (9th Cir. 1961).

It is particularly difficult for appellants to satisfy this burden where, as here, the issue has not been raised in the trial Court.

Since there was no evidentiary hearing in the trial Court upon the question of competency of counsel, this Court has not been provided with the essential information regarding the thought processes and tactical reasons behind the decisions made by counsel at trial. A similar situation would arise if a judicial body was asked to meet on Monday morning and decide whether a football coach's Saturday decision on the twelfth play of the third quarter indicated such incompetence as to render the game "a farce or sham," without even hearing the coach's reason for the "ineffective" decision. Appellants' suggestion of reversal would open the gates for a vast flood of litigation by unsuccessful defendants, contending that second and third trials (perhaps more) would be required because appellate counsel's theories of trial tactics differ with those of trial counsel, at least in regard to a few of the myriad decisions made upon the spur of the moment during trial.

In Mitchell v. United States, 259 F.2d 787 (C.A.D.C. 1958), the Court of Appeals noted that it is "axiomatic that convicted felons almost unanimously relish the prospect of putting to public judicial test the competence of their erstwhile defenders;" that "almost any judge or lawyer can point to

potential mistakes in reviewing the record of a lost cause"; that "almost every convicted person can think up several points in his trial where the course taken by his lawyer could have been different"; and that "An accused bound to tactical decisions approved by a judge would not get the due process of law we have heretofore known" (at pp. 791,792,793).

The Court also stated (at p.793):

"Another imperative reason against permitting the procedure sought here is that it would destroy the representation of indigent criminals by the bar. No reputable member of the bar would, nor indeed should, undertake as a public duty the defense of an accused, if the courts were to permit the client thereafter to institute, by allegations as to trial tactics, a public inquiry into the professional competence of the lawyer. This would surely be the end of the lawyers' duty to accept assignments by the courts. One of the great protections of the unfortunate would be gone, destroyed not by the bar but by the courts."

In Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), in which the question of competency of counsel was involved, this Court stated (at p. 37):

"This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right. Due process does not require 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'"

This statement of the law was recently quoted with approval in Benson v. State Board of Parole & Probation, et al., 9th Cir., October 23, 1967, No. 21,528, and is cited in Eaton v. United States, 9th Cir., October 23, 1967, No. 21574.

Since appellants find fault with their trial counsel's decisions in numerous instances, these will be discussed individually:

(1) The Question of Alleged Conflict of Interest.

There is no showing of a conflict of interest here. Each appellant presented the same defense. Each provided substantially the same narrative of events. Neither attempted to implicate the other. On the contrary, appellant McCrea clearly indicated a belief that Speer was innocent [R.T. 71-72], and Speer supported the key point in McCrea's defense, which was the claim that two Marines were in the vehicle for a while [R.T. 101]. Their defenses were not inconsistent because both were attempting to place the blame upon the missing "Marines", a factor emphasized in closing argument [R.T. 161-62].

In Lugo v. United States, 350 F.2d 858,859 (9th Cir. 1965), this Court declined to "create a conflict of interest out of mere conjecture as to what might have been shown" where "identical defenses -- total disclaimer of knowledge as to how the narcotics got into their car -- were presented by the defendants, and each backed up the other's story."

Appellants evidently decided to sink or swim together. No conflict of interest was found in similar factual situations in Chavira Gonzales v. United States, 314 F.2d 750,752 (9th Cir. 1963), in which the defenses of the

various defendants did not "run afoul of each other," nor in Peek v. United States, 321 F.2d 934 (9th Cir. 1963), cert. denied, 376 U.S. 954 (1964), in which the "interests of appellants were not in conflict with each other." (at p. 944).

It appears that appellants are contending that a conflict of interest existed because McCrea's extra-judicial statement, properly admissible only against McCrea, was "damaging" to Speer. However, assuming that this situation would result in a conflict of interest, the situation did not exist here, because the statement by McCrea was innocuous and unimportant, in light of the fact that Speer's admission of the same facts was admissible in evidence against Speer. McCrea's statement was to the effect that he could not have bought the pills, as he had no money, and that Speer financed the venture (obviously meaning that Speer financed the trip) [R.T. 52,59-61]. Speer admitted to the officers that he paid the expenses of the trip across the border [R.T. 60-61]. Both defendants testified to the same effect [R.T. 91, 105]. Since McCrea's extra-judicial statement was innocuous, its existence could not cause a conflict of interest.

(2) The Question of Severance.

Appellants contend that there should have been a motion for severance, relying upon a state decision which adopts the dissenting opinion in a United States Supreme Court decision. Appellants' argument is based upon the theory that their attorney should have discovered prior to trial that the Government intended to offer McCrea's extra-judicial statement in evidence.

However, as noted under (1) above, McCrea's extra-judicial statement was innocuous under the circumstances. Consequently, it would not furnish ammunition for a severance.

Furthermore, there is no assurance that defense counsel would have discovered the nature of the statement prior to trial. An attorney's failure to move for a bill of particulars does not provide proof of ineffectiveness of counsel.

Rivera v. United States, 318 F.2d 606,608 (9th Cir. 1963).

(3) Failure to Request Pretrial Disclosure.

Appellants argue that their counsel was ineffective because he failed to move for a bill of particulars and other possible discovery matters. Special emphasis is placed upon the possibility of achieving a dismissal if the Government failed to disclose the informant.

However, disclosure of an informant in a routine border-crossing smuggling case ordinarily is not required.

Smith v. United States, 9 F.2d 386,387 (9th Cir. 1925);

Jones v. United States, 326 F.2d 124,127,129 (9th Cir.1963);

Hurst v. United States, 344 F.2d 327,328 (9th Cir. 1965);

Cook v. United States, 354 F.2d 529,531 (9th Cir. 1965);

King v. United States, 348 F.2d 814,819 (9th Cir. 1965), cert. denied, 382 U. S. 926 (1965);

Alexander v. United States, 362 F.2d 379,383 (9th Cir. 1966);

Garibay-Garcia v. United States, 362 F.2d 509 (9th Cir. 1966);

Aguilar v. United States, 363 F.2d 379,381 (9th Cir. 1966).

Failure to move for a bill of particulars does not indicate incompetence of counsel.

Rivera, supra, at p. 608.

Judicial notice may be taken of the fact that failure to file a formal motion for pretrial discovery is a common occurrence in the defense of criminal cases.

(4) Failure to Object to Questioning By The Prosecutor.

Appellants state that their counsel was ineffective because he failed to object to a leading question and also failed to object to a question regarding testimony by Agent Aros in another case.

The "leading question" was the following:

"Just before you go on, Mr. Aros, did you say anything to the defendants about their rights to consult with an attorney before?"

[R.T.51].

Appellants concede that an objection might have been overruled. Even if the objection had been successful, it is difficult to imagine that the Government would have failed to produce the information by additional interrogation. By objecting, counsel would probably have accomplished nothing while giving the jurors the impression that he was attempting to hide the truth on a question having nothing to do with the issue of innocence or guilt. Inexperienced counsel might have objected, but one would hardly expect such fruitless delaying tactics by experienced counsel.

Appellants maintain that the other question to Agent Aros was an attempt to arouse sympathy "for the over-worked, heroic customs agents."

(Appellants' Opening Brief, p. 11). The question was:

"You testified in another case, did you?" [R.T. 55].

This question appeared to be relevant and proper in order to explain the confusion of the witness, who apparently testified in two trials. Failure to object to this innocuous question does not indicate incompetence of counsel.

(5) Failure to Object to Statements by Appellant McCrea.

Appellants contend that their counsel should have objected to the admission of McCrea's statement. As previously noted, the statement was innocuous and was consistent with appellants' testimony at trial.

Appellants argue that the statement was inadmissible due to lack of warning of the right to counsel. However, appellants were advised of the right to counsel [R.T.51]. Since the trial occurred on June 7 and June 8, 1966 [C.T. 5-6], compliance with the guidelines of Miranda v. Arizona, 384 U.S. 436 (1966), was not required.

Johnson v. New Jersey, 384 U.S. 719,734 (1966).

Appellants state that McCrea's statement was not admissible against Speer. In this respect, it was hearsay. Failure to object to hearsay evidence does not indicate ineffectiveness of counsel.

Rivera, supra, at pp.607-08.

Furthermore, little is to be gained by objecting to such innocuous testimony.

(6) Failure to Move For Judgment of Acquittal as to Appellant Speer.

Appellant Speer contends that a motion for judgment of acquittal should have been made at the close of the Government case. He notes that he was

a passenger in a vehicle owned and operated by appellant McCrea and that the pills were found in a coat which fit McCrea but did not fit Speer. He cites Gonzales v. United States, 301 F.2d. 31 (9th Cir. 1962), and Doherty v. United States, 318 F.2d 719 (9th Cir. 1963). In both cases, unlike the instant case, the driver and owner of the vehicle in question admitted guilt and claimed that the passenger was innocent.

The instance case comes much closer to the facts of Eason v. United States, 281 F.2d 818 (9th Cir. 1960). In Eason, the two appellants were driver and passenger in a vehicle containing marihuana, seconal, and amphetamine. The evidence against them consisted of the fact that they were nervous, one of them owned the vehicle, and they had travelled together on the trip to Tijuana, being together "most of the time." (at p.820). Co-defendant Nowlin provided the gasoline and food for the trip. This Court affirmed the conviction of both passenger and driver, noting that "the evidence of close friendship, joint venture and general conduct were sufficient to warrant a reasonable jury finding beyond reasonable doubt that possession was joint." (at p. 821).

The similarity between Eason and the instant case is remarkable. Here, appellant McCrea furnished the vehicle and appellant Speer furnished money [R.T. 60-61,65]. In view of the decision in Eason, it is respectfully submitted that failure to move for judgment of acquittal did not indicate incompetence of counsel, i.e., was not such conduct as to reduce the trial to the level of "a mockery of justice, shocking to the conscience of the court."

(7) Failure to Move For Judgment of Acquittal as to Appellant McCrea.

Appellant McCrea contends that his trial counsel demonstrated incompetence by failing to move for a judgment of acquittal upon the ground that there was no evidence that he had entered the United States.

There was considerable testimony regarding location of traffic routes and Customs facilities in relation to a diagram showing the border area [R.T. 9-13]. Since appellant McCrea did not include this important diagram as part of the record upon appeal, it is not possible for him to demonstrate that his counsel was incompetent in regard to a question of proof of entry. Furthermore, a witness testified that the vehicle in question was brought to Inspector Ramsey by Inspector Wells; that Inspector Wells was working under the canopy; that "Automobiles coming from under the canopy through the inspection lane would be coming from Mexico going north to the United States"; that the vehicle in question was stopped at the initial check point; and that the occupants were asked what they were bringing from Mexico, replying that they had a bottle of Tequila [R.T. 13-14,16,22,30]. Consequently, it is respectfully submitted that there was sufficient evidence of entry from Mexico to justify competent counsel in refraining from making a motion for judgment of acquittal. He may have considered the probability that the Court would permit the Government to reopen its case in the unlikely event that such a hypertechnical motion for judgment of acquittal was meritorious.

(8) The Offer of the Overcoat in Evidence.

Appellants contend that their trial counsel should not have offered the

coat in evidence. Since trial counsel took the position that the coat "possibly would fit fifty percent of the men in this United States . . ." [R.T. 164] and that the coat was so delapidated that neither appellant would be likely to wear such a coat, more fitting for "some poor Mexican" smuggler [R.T. 162], he had good reason to offer the coat in evidence. This does not indicate incompetence. The jury already had heard testimony to the effect that the coat fit appellant McCrea [R.T. 53]. It was admissible in evidence as a Government exhibit, so it probably would have been received in evidence without a request by appellants.

(9) Failure to Object to Alleged Misconduct.

Appellants maintain that their trial counsel indicated incompetence by failing to object to two comments by the prosecuting attorney.

The first of these was the statement that Agent Aros testified in two trials in one morning [R.T. 170]. This possibly amounted to an inconsequential addition to the evidence, which involved the testimony that Agent Aros testified in another case [R.T. 55], without reference to the date. A dignified presentation of the defense would require interruption of argument to the jury in matters of substantial importance but not in matters of insignificance.

The other questioned comment was the statement to the jury to the effect that "if there were any additional evidence available, you would certainly have it." [R.T. 167]. Appellants note that there was an informant, but they provide no evidence that he was "available." Furthermore, since the experienced trial Judge instructed the jury that "Counsel have brought to your

consideration all the facts and evidence within their reach, which, in their judgment, will assist you in determining the truth" [R.T. 182], it hardly seems plausible that defense counsel's failure to object to a similar earlier statement by the prosecuting attorney would have reduced the trial to "a mockery of justice."

(10) Failure to Request an Instruction Relating to Appellant McCrea's Extra-Judicial Statement.

Appellants maintain that their trial counsel was incompetent because he failed to request an instruction to the effect that appellant McCrea's statement was not to be considered in the case of appellant Speer.

Since the extra-judicial statement was unimportant, there was no need for such an instruction.

B. THE COURT WAS NOT REQUIRED TO GRANT A JUDGMENT OF ACQUITTAL UPON ITS OWN MOTION IN THE CASE OF APPELLANT SPEER.

Appellant Speer contends that the trial Court should have made a motion for judgment of acquittal upon behalf of appellant Speer at the close of the Government case and then should have ruled in favor of its own motion. No authority is cited for this remarkable proposition. A trial judge is not an advocate. The concept of an impartial judge is basic to our system of justice.

Mitchell, supra, at p. 793.

C. THE COURT WAS NOT REQUIRED TO GRANT A JUDGMENT OF
ACQUITTAL UPON ITS OWN MOTION IN THE CASE OF APPELLANT
McCREA.

Appellant McCrea also contends that the trial Judge should have made a motion for judgment of acquittal upon his behalf and should have granted it. He cites Kramer v. United States, 147 F.2d 202 (9th Cir.1945), which does not support his position.

Apparently he is contending that there was no direct evidence that appellants entered the United States. However, as noted under A(7) above, there was adequate evidence of entry, even without considering the diagram evidence which appellants have failed to bring before this Court.

D. THE TRIAL COURT'S RULING UPON AN OBJECTION TO INSPECTOR
RAMSEY'S TESTIMONY DID NOT CONSTITUTE ERROR.

Appellants assert that the trial Judge committed error in sustaining an objection to defense counsel's question regarding Inspector Ramsey's knowledge concerning the location of the pills before the vehicle went to Mexico. The record demonstrates that the objection was not sustained. It was overruled [R.T. 24,26].

E. THE TRIAL COURT DID NOT COMMIT ERROR BY FAILING TO INSTRUCT
THE JURY TO DISREGARD McCREA'S EXTRA-JUDICIAL STATEMENT IN
SPEER'S CASE.

Since the trial Court was not requested to instruct the jury to disregard

appellant McCrea's extra-judicial statement in the case of appellant Speer, and since the extra-judicial statement was innocuous and unimportant to the case, it is respectfully submitted that failure to give the requested instruction did not constitute error.

F. THE PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN HIS CLOSING ARGUMENT.

The statement by the prosecuting attorney to the jury to the effect that Agent Aros had testified in two trials in one morning [R.T. 170] was not prejudicial to appellants, in view of the testimony that he "testified in another case . . ." [R.T. 55]. A conclusion that the other trial occurred on the same morning was a natural inference from the testimony. Consequently, the remark did not constitute misconduct.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

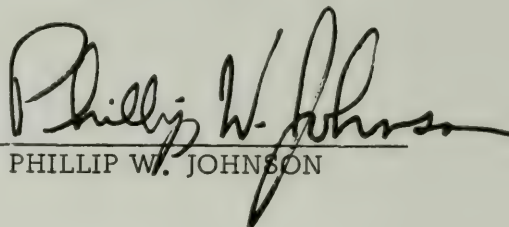
EDWIN L. MILLER, JR.
United States Attorney

PHILLIP W. JOHNSON
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



PHILLIP W. JOHNSON

NO. 21678

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IVORY COLLINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
CRAIG B. JORGENSEN,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

FILED

JUN 5 1967

WM. B. LUCK, CLERK

Attorneys for Appellee,
United States of America.

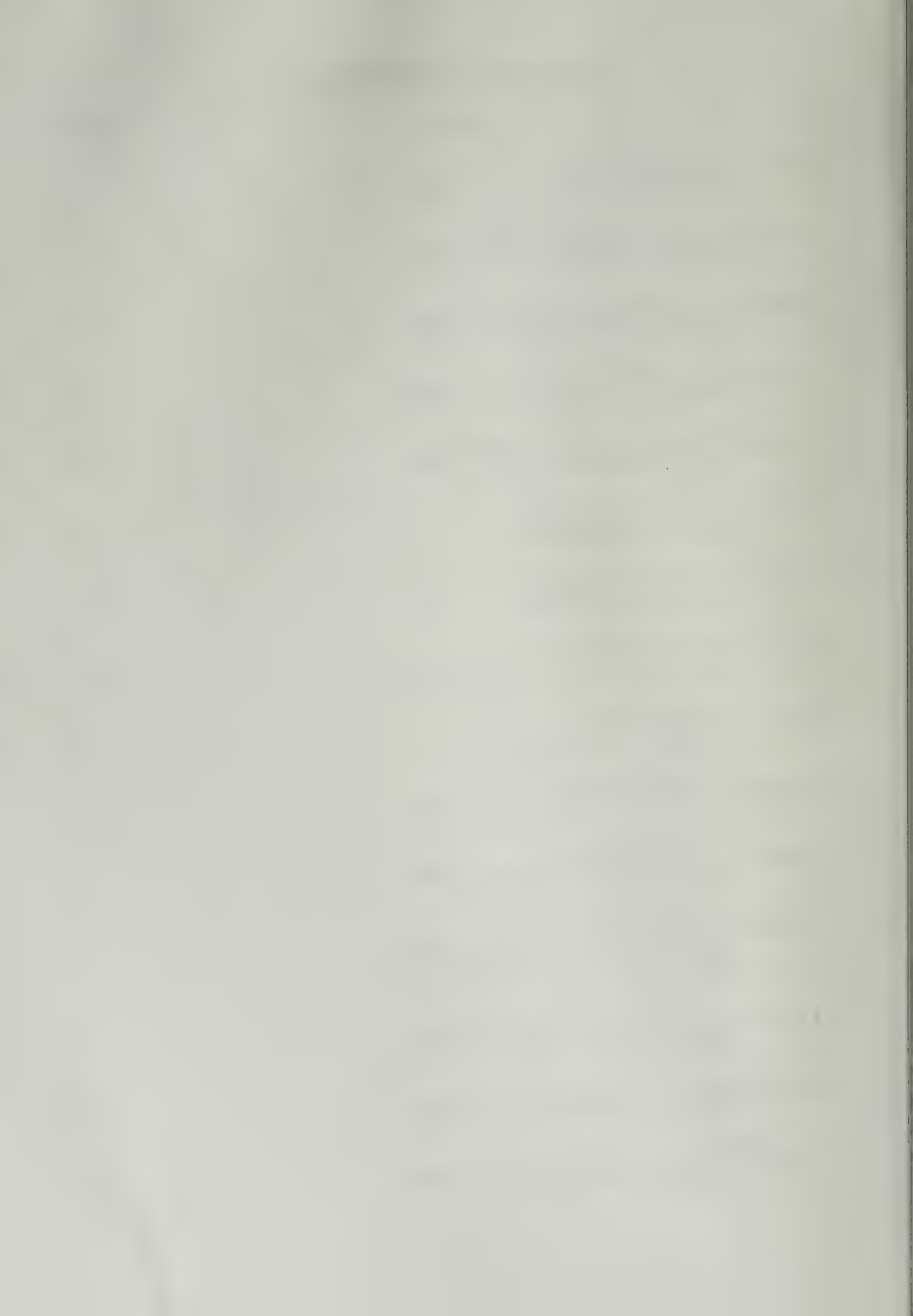
JUN 10 1967

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I JURISDICTIONAL STATEMENT	1
II STATUTE INVOLVED	2
III STATEMENT OF THE CASE	3
IV STATEMENT OF FACTS	4
V QUESTIONS PRESENTED	5
VI ARGUMENT	6
A. THE EVIDENCE IS SUFFICIENT TO ESTABLISH DEFENDANT'S POSSESSION OF THE NARCOTICS.	6
B. THE REFUSAL BY THE TRIAL COURT TO INSTRUCT ON ENTRAPMENT WAS PROPER.	7
C. NO PREJUDICIAL ERROR OCCURRED IN THE PROCEEDINGS BELOW.	8
VII CONCLUSION	11
CERTIFICATE	12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Audett v. United States, 265 F. 2d 837 (9th Cir. 1959)	7
Diaz-Rosendo v. United States, 357 F. 2d 124 (9th Cir. 1966)	7
Dunbar v. United States, 342 F. 2d 979 (9th Cir. 1965)	8
Enriquez v. United States, 314 F. 2d 703 (9th Cir. 1963)	9
Garibaz-Garcia v. United States, 362 F. 2d 509 (9th Cir. 1966)	8
Glasser v. United States, 315 U. S. 60 (1942)	7
Ingram v. United States, 360 U. S. 672 (1959)	7
Klepper v. United States, 331 F. 2d 694 (9th Cir. 1964)	9
Noto v. United States, 367 U. S. 290 (1961)	7
Ortega v. United States, 348 F. 2d 874 (9th Cir. 1965)	8
Proffit v. United States, 316 F. 2d 705 (9th Cir. 1963)	7
Stopelli v. United States, 183 F. 2d 391 (9th Cir. 1950), cert. den. 340 U. S. 864 (1950)	7
Teasley v. United States, 292 F. 2d 460 (9th Cir. 1961)	9
United States v. Comi, 336 F. 2d 856 (4th Cir. 1964)	10
United States v. Cooper, 321 F. 2d 456 (6th Cir. 1963)	7



United States v. Grosso, 358 F.2d 154 (4th Cir. 1966)	10
United States v. Hoffa, 385 U.S. 293 (1966)	6
United States v. Owens, 263 F.2d 720 (2nd Cir. 1959)	9
Wright v. United States, 192 F.2d 595 (9th Cir. 1951)	8, 9

Statutes

Title 18, United States Code, §3231	2
Title 21, United States Code, §174	2
Title 28, United States Code, §1291	2
Title 28, United States Code, §1294	2

Rules

Federal Rules of Criminal Procedure:

Rule 30	8
Rule 51	8

NO. 21678

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IVORY COLLINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On June 16, 1965, a four-count indictment was returned against appellant by the Federal Grand Jury for the Southern District of California, Central Division.

The indictment charged two counts of concealment and two counts of sale of illegally imported narcotics.

Appellant was convicted of all counts [C. T. 32]. ^{1/}

Appellant filed a timely notice of appeal [C. T. 36].

The jurisdiction of the District Court was predicated upon

^{1/} "C. T. " refers to Clerk's Transcript on Appeal.

Title 21, United States Code, Section 174 and Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal under the provision of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 21, United States Code, Section 174, provides as follows:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession

shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

STATEMENT OF THE CASE

Appellant was indicted on June 16, 1965, charged with both concealment and sale of heroin on each of two separate occasions [C. T. 2-5].

He was arraigned on July 6, 1965, and entered a guilty plea to all counts on August 23, 1965 [C. T. 6-7].

Trial by jury commenced September 21, 1965, before the Honorable Peirson M. Hall, United States District Judge [C. T. 28]. Appellant was found guilty on all counts on September 23, 1965 [C. T. 32].

On October 11, 1965, appellant was sentenced to 15 years on each of Counts One and Two to run concurrently, and five years imprisonment on each of Counts Three and Four to run concurrently to each other and consecutively to Counts One and Two [C. T. 33].

Appellant filed a Notice of Appeal on October 11, 1965 [C. T. 36].

IV

STATEMENT OF FACTS

A few days before March 9, 1964, appellant agreed to sell one ounce of heroin to Albert Johnson for \$300 [R. T. 64-65]. ^{2/}

On March 9, 1964, Johnson called appellant and told him he was ready. Appellant then said come over to the house [R. T. 67]. This call was monitored by agents of the Federal Bureau of Narcotics [R. T. 66, 113-114].

Johnson and his car were searched and he was given \$300 advance funds [R. T. 67].

Narcotics Agents followed Johnson to appellant's home where he met appellant [R. T. 68]. Johnson gave appellant the advance funds and followed him to a taco stand. Appellant went behind the stand, then returned and gave the heroin to Johnson [R. T. 57, 69].

On April 6, 1965, Johnson again called appellant and asked to purchase an ounce of heroin. Appellant told Johnson to meet him in a park. This call was also monitored by Federal Agents [R. T. 74, 131].

Appellant met Johnson at the park, at which time Johnson gave appellant \$300 in advance funds and was told that appellant had the heroin stashed [R. T. 75]. Johnson then followed appellant to a parking lot where he was told the heroin was in the phone booth.

^{2/} R. T. refers to Reporter's Transcript.

Johnson looked in the phone booth but couldn't find it. Appellant then told him it was over the door, and Johnson found it [R. T. 75-77].

While in the parking lot, appellant told Johnson that this was the manner in which he would deal in the future. A buyer would call him and he would have the heroin stashed in some place and tell the buyer where to pick it up [R. T. 78]. Appellant also told Johnson he was going to Mexico to get more heroin [R. T. 78].

Prior to going to the park to meet appellant, Johnson was provided with a transmitter [R. T. 76]. As a result, the conversation at the park and the parking lot were overheard by the Federal Agents who were working surveillance [R. T. 133-137].

Appellant's defense was that his meetings with Johnson were to straighten out a misunderstanding involving appellant and Johnson's wife [R. T. 168-169, 173]. He further denied ever selling narcotics to Johnson, receiving money from him, or using the term "piece of stuff" in a conversation with him [R. T. 178-179].

V

QUESTIONS PRESENTED

1. Is the evidence sufficient to establish possession of the narcotics by defendant?
2. Did the Court err in refusing to instruct on entrapment?
3. Did the court commit plain error in failing to strike



certain testimony or declare a mistrial?

VI

ARGUMENT

A. THE EVIDENCE IS SUFFICIENT TO
ESTABLISH DEFENDANT'S POSSES-
SION OF THE NARCOTICS.

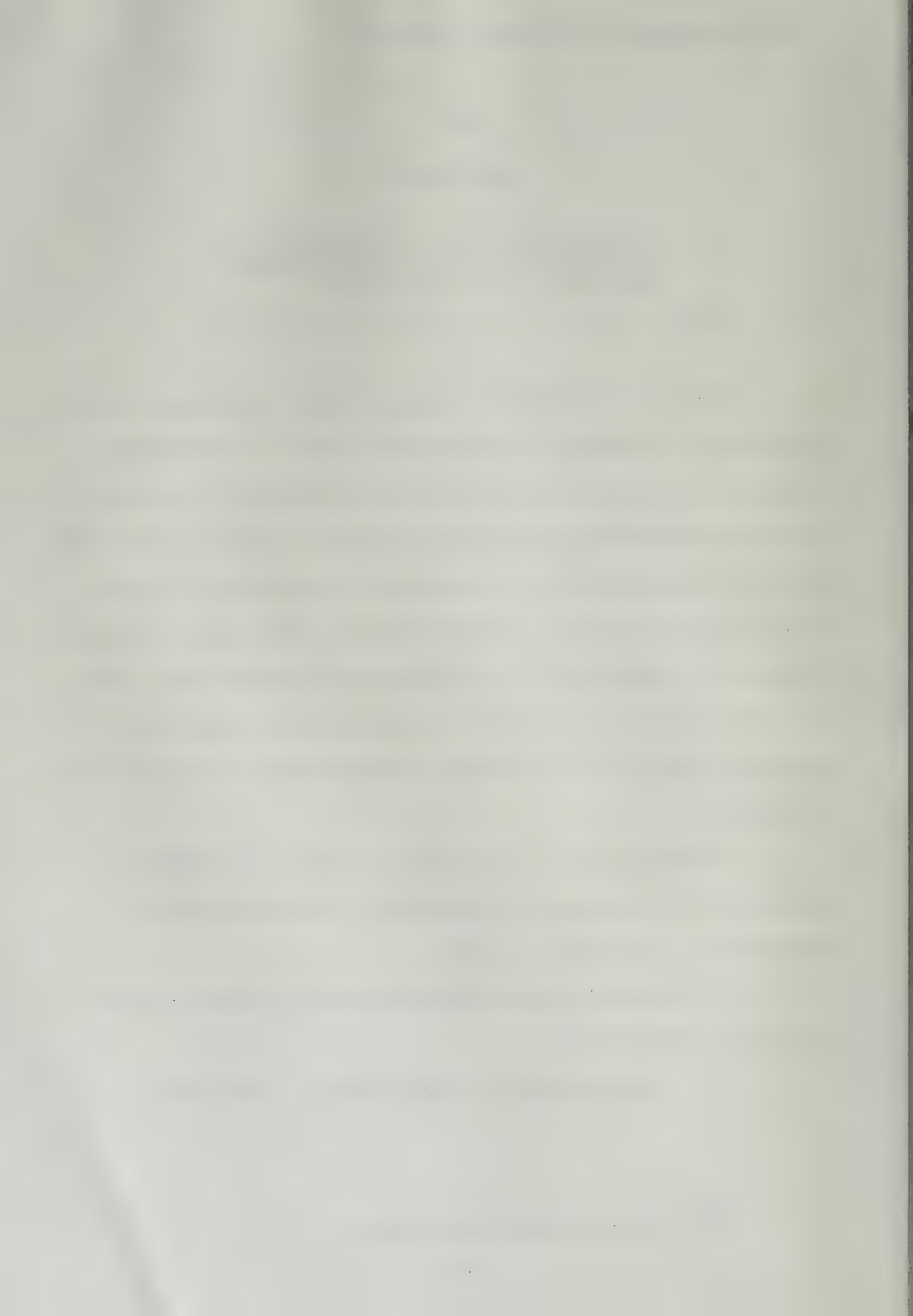
That there was direct evidence of defendant's possession of the heroin is conceded by appellant [A. B. 8]. ^{3/} The evidence consisted of testimony by a government informant that the heroin was delivered to him by the appellant [R. T. 57, 69, 75, 77]. This testimony was partially corroborated by the government agents who monitored the phone calls that resulted in the agreement and observed the meetings of the informant and appellant [R. T. 113-14, 118-19, 131-32, 136-37]. From these facts, appellant's contention that there is no evidence of possession is patently without merit.

The only question remaining, therefore, is whether the testimony of an informant is sufficient to establish the fact of possession. The answer is clear:

An informant's testimony is competent and his credibility is exclusively for the jury.

United States v. Hoffa, 385 U. S. 293 (1966);

^{3/} A. B. refers to Appellant's Brief.



United States v. Cooper, 321 F.2d 456, 458

(6th Cir. 1963);

Proffit v. United States, 316 F.2d 705

(9th Cir. 1963);

Stopelli v. United States, 183 F.2d 391

(9th Cir. 1950), cert. denied,

340 U.S. 864 (1950).

The uncorroborated testimony of a competent witness, whether he is an informant or accomplice, is sufficient to prove a fact. Audett v. United States, 265 F.2d 837 (9th Cir. 1959).

When, as here, the jury choose to believe a witness, this Court will not substitute its judgment for that of the jury.

Diaz-Rosendo v. United States, 357 F.2d 124 (9th Cir. 1966).

In considering the sufficiency of the evidence, an appellate court must view the evidence in the light most favorable to the appellee, together with all reasonable inferences which may be drawn from that evidence. Noto v. United States, 367 U.S. 290 (1961); Glasser v. United States, 315 U.S. 60 (1942). If the court finds substantial evidence, it must presume the findings of fact to be correct and sustain the judgment. Noto v. United States, supra; Ingram v. United States, 360 U.S. 672, 678 (1959).

B. THE REFUSAL BY THE TRIAL COURT
TO INSTRUCT ON ENTRAPMENT WAS
PROPER.

That a defendant who denies committing the acts charged is

not entitled to an instruction on the defense of entrapment is settled in this circuit.

Garibaz-Garcia v. United States, 362 F.2d 509

(9th Cir. 1966);

Ortega v. United States, 348 F.2d 874

(9th Cir. 1965);

Dunbar v. United States, 342 F.2d 979

(9th Cir. 1965).

Since appellant at the trial denied having committed the acts which constituted the crime [R. T. 171, 178], the trial court did not err in refusing to instruct on entrapment.

C. NO PREJUDICIAL ERROR OCCURRED
IN THE PROCEEDINGS BELOW.

Although the Court and the Assistant United States Attorney gave him every opportunity to do so, appellant refused to object or move to strike any of his testimony on cross-examination of which he now complains [R. T. 171, 175-6]. Neither did appellant request, orally or in writing, a limiting instruction on the evidence elicited. His reason is apparent: he agreed that the evidence would be proper on the issue of credibility [R. T. 199]. Appellant has, therefore, waived any objection to the introduction of the evidence, Fed. R. Crim. P. 51, and to the court's failure to give a limiting instruction. Fed. R. Crim. P. 30; Wright v. United States, 192 F.2d 595, 596

(9th Cir. 1951).

Assuming arguendo that this contention is properly before the court, the evidence is admissible under the circumstances. Clearly, a defendant may be asked about prior felony convictions for impeachment purposes. Admission of appellant's conviction for possession of marihuana was therefore proper on the issue of his credibility. United States v. Owens, 263 F.2d 720 (2nd Cir. 1959). Appellant, it should be noted, was not asked whether he had been convicted of possession of marihuana, but whether he had been convicted of possession of narcotics; appellant answered that he had been convicted of possessing marihuana [R. T. 196]. No further questions were asked on this issue, and appellant took no steps to strike the answer or to limit it.

Additionally, evidence of prior possession of narcotics is admissible on the issue of knowledge or intent in a trial for possession of heroin; the questions as to prior possession of narcotics were therefore proper. Enriquez v. United States, 314 F.2d 703 (9th Cir. 1963); Teasley v. United States, 292 F.2d 460, 466-7 (9th Cir. 1961). For the same reason, cross-examination of appellant as to whether he had knowledge of narcotics and had dealt with narcotics was proper under the recognized exception that in a narcotics case, evidence of prior similar acts to show "knowledge" is admissible. Klepper v. United States, 331 F.2d 694 (9th Cir. 1964); Enriquez v. United States, supra. Even without a cautionary instruction, its admission is not erroneous. Wright v. United States, supra; cf. Teasley v. United States, supra.

Moreover, under the authority cited above, absent an objection, a motion to strike, or a request for a limiting instruction, appellant cannot contend that introduction of this evidence was prejudicial error.

It is noteworthy that appellant cites not a single case in support of his contention that the trial court committed plain error in failing to strike appellant's testimony, give a limiting instruction, or declare a mistrial, even though the record is conspicuously devoid of action by the appellant to prevent error. A defendant may not sit idly by in the face of error and later take advantage of a situation he has helped to create. United States v. Grosso, 358 F.2d 154 (4th Cir. 1966). In this case, appellant clearly invited error, if there was any, by his refusal to object or move to strike [R. T. 196, 198-9], failure to request a limiting instruction, and failure to move for a mistrial.

Finally, in view of the foregoing discussion, any alleged error was by no means "plain", since all of the testimony was probably admissible over a proper objection. Appellant's failure to act to exclude or limit it will not serve to make the error "plain", or to show prejudice resulting from its admission in view of the strong case against him. See United States v. Comi, 336 F.2d 856, 861 (4th Cir. 1964).

VII

CONCLUSION

For the foregoing reasons, it is submitted that appellant's conviction should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

CRAIG B. JORGENSEN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen
CRAIG B. JORGENSEN

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL S. URBINA,
Appellant,
vs.
GEORGIA GILFILEN,
Appellee.

No. 2 1 6 7 9

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

FILED

AUG 1 1957

WM H. LUCK, CLERK

ARTHUR H. TIBBITS
55 New Montgomery Street
San Francisco, Calif. 94105

Attorney for Appellant

AUG 1 1957

1 IN THE
2 UNITED STATES COURT OF APPEALS
3 FOR THE NINTH CIRCUIT
4

5
6 DANIEL S. URBINA,

7 Appellant,

8 vs.

9 GEORGIA GILFILEN,

10 Appellee.
11

No. 2 1 6 7 9

12
13
14 APPELLANT'S OPENING BRIEF
15
16
17
18
19
20
21

22 ARTHUR H. TIBBITS
23 55 New Montgomery Street
24 San Francisco, Calif. 941

25 Attorney for Appellant

SUBJECT INDEX

Page

I

Statement of jurisdiction 1

II

Statement of the case 2

A. The nature of the controversy 2

B. Questions presented 3

C. Specifications of error 4

III

Argument 5

A. The District Court was without jurisdiction of this action, no Order having been entered transferring it from the State Court 5

B. A genuine issue of a material fact existed upon the Complaint and the Affidavits filed in support of and in opposition to Appellee's Motion for Summary Judgment 6

Conclusion 12

TABLE OF AUTHORITIES CITED

Cases	Pages
Barr v. Matteo, 360 U.S. 564	9
Browner v. Pearl Assurance Co., C.A. 9 (1958) 267 F 2d 45, 46	11
Kasper v. Baron, CA 8 1951, 191 F 2d 737, 738	12
Lane Bryant v. Maternity Lane Ltd. of Calif., C.A. 9 1949, 173 F. 2d 559, 565, 173 F 2d 559, 565	11
Preble v. Johnson, C.A. 10 1960, 275 F. 2d 275	9
U.S. v. Diebold, Inc., 369 U.S. 654	11
Daniel S. Urbina v. United States, 180 Ct. Cl. ____	3
Daniel S. Urbina v. Georgia Gilfilen, Circuit Court, First Circuit, State of Hawaii, Action No. 9556	5
Rules	
Federal Rules of Civil Procedure, Rule 77(d)	3, 6
Statutes	
28 U.S.C., Section 1442(a)	1
28 U.S.C., Sections 1291, 1294	1
Texts	
6 Moore's Federal Practice: Pages 2281 et seq., §56.15	11

I

STATEMENT OF JURISDICTION

This is an appeal from a final judgment in favor of Appellee, Georgia Gilfilen, rendered by the United States District Court for the District of Hawaii, in a libel action by the Appellant against the Appellee. (CTR 55) The action was commenced in the Hawaii State Court (CTR 11) and transferred to the United States District Court under the provisions of 28 U.S.C. 1442 (a). No Court Order was entered authorizing said transfer. (CTR) Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1291 and 1294. A timely notice of appeal was filed on October 25, 1966, (CTR 58) within thirty days after entry of judgment on September 26, 1966 (CTR¹ 55).

¹Parenthetic references preceded by "CTR" are to the Clerk's Transcript of Record; and by "TR" to the transcript of proceedings in the District Court.

II

STATEMENT OF THE CASE

A. The Nature of the Controversy.

Appellant, Daniel S. Urbina, filed this action of libel in the Circuit Court of the First Circuit, State of Hawaii, Civil No. 19556, on July 11, 1966, alleging that Appellant and Appellee were both employees of the United States Air Force at Honolulu, Hawaii, and charging the Appellee with having written an untrue, false and defamatory memorandum concerning the Appellant with reckless disregard as to the falsity of the allegations contained therein as a result of which the Appellant was prejudiced and damaged in his career with the Federal Government and profession and suffered general damages in the total amount of \$100,000.00 and special damages as determined after filing of the suit (CTR 11). Upon motion of the Appellee, the action was removed to United States District Court for the District of Hawaii on about August 8, 1966. No Order was entered by the Court authorizing this transfer (CTR). Appellant filed a Motion to Remand on or about August 11, 1966, (CTR 23) and Appellee filed a Motion to Dismiss Complaint and for Summary Judgment on or about September 12, 1966 (CTR 30). After a hearing on both motions on September 22, 1966, the Court denied Appellant's Motion to Remand and granted Appellee's Motion for Summary Judgment. Judgment was entered in

1 favor of Appellee and against Appellant on September 26, 1966
2 (CTR 55).

3 Appellant has filed a companion action in the United
4 States Court of Claims No. 113-63 entitled Daniel S. Urbina v.
5 United States based upon the same circumstances as those in
6 the instant case for recovery of damages against the United
7 States Government for the wrongful termination of his employ-
8 ment based upon an alleged false claim for reimbursement of
9 quarters allowance. By decision dated May 12, 1967, the United
10 States Court of Claims granted Appellant's Motion for Summary
11 Judgment with the amount of the recovery to be determined in
12 further proceedings. The Court's opinion is set forth in 180
13 Ct. Cl. ____ and is incorporated by reference as though fully
14 set forth herein.

15 Appellant has appeared throughout these proceedings in
16 pro per until represented in this Court by his present attorney
17 Arthur H. Tibbits, Esq. on or about March 3, 1967.

18 B. Questions presented:

19 The only questions presented on this appeal are whether
20 (1) the District Court had jurisdiction of this action in the
21 absence of an Order and Notice to this effect as provided by
22 FRCP 77(d), and (2) the judgment below was properly entered upon
23 Appellee's Motion for Summary Judgment where factual issues were
24 presented upon the Appellant's Complaint and the affidavits
25 filed on behalf of Appellant and Appellee.

1 C. Specifications of Error.

2 The District Court erred as a matter of law in taking
3 jurisdiction of this action without an order having been entered
4 transferring the action from the State Court to the United
5 States District Court.

6 The District Court erred as a matter of law in holding
7 that Appellee acted within the outer perimeter of her line of
8 duty in submitting the written memorandum dated July 13, 1961
9 to her supervisor.

0 The District Court erred in entering a judgment upon
1 Appellee's Motion for Summary Judgment where a factual issue
2 was raised by the pleadings and affidavits.

III

ARGUMENT

1
2 A. The District Court was without jurisdiction of this action,
3 no Order having been entered transferring it from the State
Court.

4 The Appellant initiated this action on July 11, 1966 in
5 the Hawaii State Court (Circuit Court of the First Circuit,
6 State of Hawaii, Action No. 9556). (CTR 10 to 13). The Appellant
7 on July 26, 1966, filed a Petition for Removal of this action
8 to the United States District Court for the District of Hawaii
9 (CTR 1 to 9, 14 to 15). On July 28, 1966, the Appellee filed
10 a "Motion to Extend Time to Answer or Otherwise Plead to the
11 Complaint" in the District Court. (CTR 16-18). On August 3,
12 1966, the Appellant filed "Appellant's Objection to Defendant's
13 Petition for Removal" filed herein July 26, 1966 (CTR 19). On
14 August 4, 1966, Appellant further filed "Plaintiff's Response to
15 Defendant's Purported Motion to Extend Time to Answer or Other-
16 wise Plead to the Complaint in Notice of July 28, 1966",
17 objecting to Appellee's "Motion to Extend Time to Answer or
18 Otherwise Plead to the Complaint" on the ground that Appellee's
19 Petition for Removal from the State Court to the District Court
20 had not been acted upon. Nevertheless, on August 8, 1966, an
21 order was entered in the District Court granting Appellee's
22 Motion to Extend Time to Answer or Otherwise Plead to the Com-
23 plaint.

24 It does not appear, however, that an Order was entered
25 by the District Court granting Appellee's Petition for Removal

1 or that a notice of said Order was mailed to Appellant by the
2 Clerk of the District Court as required by the Federal Rules of
3 Civil Procedure, Rule 77(d). Accordingly, the District Court
4 was without jurisdiction of this action and its Order granting
5 Summary Judgment for the Appellee entered September 26, 1966
6 was and is of no legal effect. The Summary Judgment should be
7 set aside and the action should be remanded to the District
8 Court for further proceedings therein on this ground alone.

9
10 B. A genuine issue of a material fact existed upon the Com-
11 plaint and the Affidavits filed in support of and in
opposition to Appellee's Motion for Summary Judgment.

12 The Complaint alleged in substance that Appellant and
13 Appellee were both civilian employees of the United States Air
14 Force at Honolulu, Hawaii; a dispute arose between the Appellant
15 and Arthur W. Palman, Chief of the Civilian Personnel Division,
16 and Appellee's supervisor, over the sum of \$645.54; the dispute
17 was reflected in certain false and unfounded allegations made
18 by Mr. Palman concerning the Appellant in a letter dated July 3,
19 1961, and Appellant's reply thereto dated July 7, 1961; the
20 Appellee was designated by Mr. Palman to advise and assist the
21 Appellant in preparation of said reply dated July 7, 1961;
22 Appellee wrote a memorandum dated July 13, 1961 to Mr. Palman
23 charging Appellant with untrue and false and defamatory matters,
24 knowing the same to be false. As a result of
25

1 said memorandum Appellant was damaged in his career with the
2 Federal Service and in his profession (CTR 10 to 13).

3 Mr. Palman's letter to Appellant dated July 3, 1961,
4 referred to above was entitled "Notice of Proposed Removal"
5 and charged him with having submitted false claims for reim-
6 bursement of quarters allowance pertaining to a house in Tokyo
7 based on his claimed ownership of said house.^{1/} (Exhibit "C"
8 to Appellee's Motion to Dismiss Complaint and for Summary Judg-
9 ment) (CTR 43-45). In this letter, Mr. Palman states in part
10 (CTR 44):

11 "Your written reply should be addressed to the under-
12 signed. Advice and assistance in preparing your
13 reply may be obtained from your Placement and Em-
14 ployee Relations Advisor, Miss Georgia Gilfilen"

15 Appellee's written memorandum dated July 13, 1961, re-
16 ferred to above, which is the subject of this controversy,
17 reads in part as follows: (Attachment to Exhibit "A" to
18 Appellee's Motion to Dismiss Complaint and for Summary Judgment)
(CTR 33).

19 "3. It has been established beyond a reasonable doubt
20 that:

- 21 a. Mr. Urbina owns the house in question, either
wholly or in part.
- 22 b. He submitted false claims for reimbursement
23 of Personally Owned Quarters Allowance.
- 24 c. He submitted false claims for reimbursement
25 of Private Rental Allowance while occupying
self-owned quarters." (Underscoring added)

^{1/} Appellant in fact was not the owner of this house nor did he
claim any ownership of it.

1 That these statements by the Appellee in her written
2 memorandum of July 13, 1961 were untrue has been established
3 and adjudicated by the Court of Claims in its decision rendered
4 May 12, 1967 in favor of the Appellant and against the United
5 States Government in proceedings entitled Urbina v. United
6 States, Action No. 113-63. The Court of Claims stated as follow
7 at page 9 of its printed decision, as yet unreported:

8 "On the central issue involved as to the ownership of
9 the property, it was shown conclusively that neither
10 plaintiff nor his wife then owned the house or land,
and that such ownership was in plaintiff's brother-
in-law and father-in-law." (Underscoring added)

11 In her Motion to Dismiss the Complaint and for Summary
12 Judgment the Appellee attached two affidavits, one by Arthur
13 G. Palman and one by herself. Mr. Palman in his affidavit state
14 that the Appellee was at the time of writing the memorandum of
15 July 13, 1961, an employee working under his direction and con-
16 trol, and had prepared the memorandum at his request. The
17 affidavit of the Appellee in essence corroborated Mr. Palman's
18 affidavit in stating that the memorandum in question was pre-
19 pared by her at the direction of Mr. Palman and in the course
20 of her employment. (CTR 32, 34-35)

21 The Appellant denied the Appellee's claim that she was
22 acting in the course of the outer perimeter of her duty as an
23 employee of the government in his affidavit attached to his
24 Motion to Remand which reads in part as follows: (CTR 26.)
25

1 "2. That defendant's negligent or wrongful acts are
2 beyond the outer perimeter of line of duty of
3 federal employees which does not constitute acts
4 under color of office within the meaning of the
5 removal statute as alleged in defendant's
6 petition to remove filed herein July 26, 1966."

7 It is clear from the foregoing that a genuine issue of
8 fact existed at the time the Court entered its Order granting
9 Summary Judgment, to-wit: Did the Appellee prepare the written
10 memorandum of July 13, 1961 at the request of her supervisor,
11 Mr. Palman? If she did, then under the more recent decisions
12 she would have been acting within the outer perimeter of line
13 of duty and her memorandum would be absolutely privileged. On
14 the other hand, if she had not been so authorized, but had been
15 merely requested and authorized to advise and assist the Appel-
16 lant in the preparation of his response to the removal action
17 initiated against him, then her written memorandum would be
18 only conditionally privileged, and if malice and the other
19 elements of a libel action were shown, then Appellant would be
20 entitled to recovery.

21 Barr v. Matteo, 360 U.S. 564
22 Preble v. Johnson, C.A. 10 1960, 275 F. 2d 275

23 Appellant respectfully submits that the true extent of
24 Appellee's employment is revealed by Mr. Palman's letter dated
25 July 3, 1961, in which he expressly designated the Appellee,
Georgia Gilfilen, to advise and assist the Appellant in prepar-
ing a reply to his letter of July 3, 1961 (CTR 44), and by

1 Appellee's affidavit dated July 26, 1961 filed in support of
2 her Petition for Removal filed on July 29, 1966, in which she
3 stated that she was designated to assist the Appellant in pre-
4 paration of such a reply (CTR 5-6). No where in Mr. Palman's
5 earlier letter of July 3, 1961, or in Appellee's earlier affi-
6 davit dated July 26, 1966 was there any indication or mention
7 that the Appellee was designated or authorized to review the
8 charges leveled against the Appellant and to submit a memorandum
9 in connection therewith. The only basis for such alleged desig-
10 nation or authorization appears in later affidavits of Mr. Palma
11 dated August 31, 1966 and of Appellee dated September 12, 1966
12 filed in connection with her Motion to Dismiss and for Summary
13 Judgment (CTR 32, 34-35) which appear to be an after thought.
14 Accordingly, on the basis of Appellee's own supporting affidavit
15 there appears to be a genuine question as to Appellee's authorit
16 to act in connection with the preparation of her written memoran
17 dum of July 13, 1961.

18 The District Court apparently relied solely on the late
19 affidavits of the Appellee and Mr. Palman in connection with
20 Appellee's Motion for Summary Judgment and overlooked entirely
21 the inconsistency between these affidavits and the earlier lette
22 of Mr. Palman and the earlier affidavit of the Appellee referred
23 to above, in both of which the statements are made that Appellee
24 was merely designated to assist the Appellant and not to write a
25 memorandum substantiating the charges against him. (TR 21-29)

1 Finally, Appellee's title "Placement and Employee Relations Ad-
2 visor" (see Palman's letter of July 3, 1961) (CTR 44) demon-
3 strates that Appellee's authority was confined to advising em-
4 ployees not to reviewing administrative charges against them.
5 In any event Appellant submits this apparent conflict in the
6 affidavits in support of her Motion for Summary Judgment raises
7 an issue as to the credibility of said affidavits which may not
8 be decided by summary judgment.

9 C. Where there is a genuine issue of material fact, it is
10 improper to enter a Summary Judgment.

11 The function of a Summary Judgment is to avoid a useless
12 trial; and a trial is not only useless but absolutely necessary
13 where there is a genuine issue as to any material fact. In rul-
14 ing on a Motion for Summary Judgment, the Court's function is
15 to determine whether such a genuine issue exists, not to resolve
16 any existing factual issues; and to deny Summary Judgment where
17 is a genuine issue as to any material fact.

18 U. S. v. Diebold, Inc., 369 U.S. 654

19 Browner v. Pearl Assurance Co., C.A. 9 (1958) 267 F 2d
20 45,46

See 6 Moore's Federal Practice § 56.15 at ps. 2281, et

21 The Ninth Circuit has insisted that a judgment cannot
22 validly be based upon the summary trial by affidavits, and that
23 the parties are entitled to have issues of fact tried at trial
24 through introduction of exhibits and witnesses produced for dire
25 and cross examination.

Lane Bryant v. Maternity Lane Ltd. of Calif., C.A. 9
1949, 173 F. 2d 559,565, 173 F 2d 559,565

1 Finally a plaintiff is not entitled to summary judgment
2 where his credibility and that of his supporting affiants is in
3 issue.

4 Kasper v. Baron
5 CA 8 1951, 191 F 2d 737, 738

6
7 CONCLUSION

8 It is respectfully submitted, for each of the reasons
9 hereinabove set forth, that the judgment entered in favor of
10 Appellee and against Appellant be reversed and the action
11 remanded for further proceedings in the District Court.

12 Dated, San Francisco, California,

13 July 30, 1967

14 Respectfully submitted,

15 *Arthur H. Tibbits*

16 Arthur H. Tibbits,
17 Attorney for Appellant Daniel S.
18 Urbina
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
3
7
3
9
0
1
2
3
4
5

Dated: July 30, 1967

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

3
4
5
6
7
8
9

10
11
12

13
14

15
16
17

18

19

20

21

22

23

24

25

IN THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

GRAFT WILSON, JR.,

Appellant,

vs.

FRANK MADIGAN, Sheriff,

Appellee.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

NO. 21684

APPELLANT'S OPENING BRIEF

Appeal from Order Denying
Petition for Writ of Habeas
Corpus

JAMES J. HARTY, and
VINCENT L. CRACON
955 Folk Street
San Francisco 34102
Telephone: 776-8930

FILED

AUG 17 1967

Attorneys for Appellant

WM. B. LUCK, CLERK

AUG 17 1967

IN THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

GRANT WILSON, Jr.,

Appellant,

-v-

FRANK MADIGAN, Sheriff,

Appellee.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

NO. 21684

APPELLANT'S OPENING BRIEF

Appeal from Order Denying
Petition for Writ of Habeas
Corpus

JOHN J. FAHEY, and
EDWARD L. CRAGEN
555 Polk Street
San Francisco 94102
Telephone: 776 8990

Attorneys for Appellant

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES CITED	ii
I. JURISDICTIONAL STATEMENT	1
A. Legal Grounds Disclosing Basis of Jurisdiction herein	1
B. Opinions Below	1
C. Statement of the Pleadings and Facts Conferring Jurisdiction	2
II. STATEMENT OF THE CASE	6
III. SUMMARY OF OPINIONS BELOW	9
A. Holding of California	9
B. Holding of the United States District Court	11
IV. SPECIFICATION OF ERROR	12
THE UNITED STATES DISTRICT COURT ERRED IN HOLDING THAT APPELLANT WAS NOT ENTITLED TO THE BENEFIT OF THE RULE OF PROSPECTIVE APPLI- CATION OF <u>GRIFFIN VS. CALIFORNIA</u> ACCORDING TO <u>TEHAN VS. SHOTT</u> . IT FURTHER ERRED IN HOLDING THAT <u>JOHNSON VS. NEW JERSEY</u> CONTROLS HEREIN RE PROSPECTIVE APPLICATION OF <u>MIRANDA VS. ARIZONA</u> .	
V. ARGUMENT	13
VI. CONCLUSION	16
APPENDIX	Following page 17

TABLE OF AUTHORITIES CITED

	<u>Page</u>
<u>Escobedo v. Illinois</u> , 378 U.S. 478, 84 S.Ct. 1758 (1964)	15, 16
<u>Fay v. Noia</u> , 372 U.S. 391, 83 S.Ct. 822 (1963)	1
<u>Griffin v. State of California</u> , 380 U.S. 609, 85 S.Ct. 1229 (1965)	10, 11, 13, 14, 15, 16
<u>Johnson v. State of New Jersey</u> , 384 U.S. 719, 86 S.Ct. 1772 (1966)	4, 5, 13, 14, 15
<u>Miranda v. State of Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602 (1966)	4, 11, 12, 13, 14, 15
<u>People v. Dorado</u> , 62 Cal.2d 338, 42 Cal. Rptr. 169 (1965)	10, 15
<u>People v. Simmons</u> , 28 Cal.2d 699, 172 P.2d 18, (1946)	12
<u>People v. Wilson</u> , 238 C.A.2d 447, 48 Cal. Rptr. 55 (1965)	1, 3, 9
<u>Tehan v. United States Ex. Rel. Shott</u> , 382 U.S. 406, 86 S.Ct. 459 (1966)	11, 13, 14, 16

Texts

<u>Webster's New Collegiate Dictionary</u> , 2nd Edition	14
--	----

Codes

Title 28, United States Codes,	
Section 1291	1
2241 (a)	1
2241 (c) (3)	1
2242	1
2253	1, 5
California Penal Code Section 459	2
647(e)	10

Rules

Page

Title 28, United States Codes, Federal
Rules of Civil Procedure, Rule 81 (a)(2)

1

United States Constitution

Fifth Amendment

1

Sixth Amendment

1

Fourteenth Amendment

1

JURISDICTIONAL STATEMENTA. Legal Grounds Disclosing Basis of
Jurisdiction herein:

Jurisdiction of the United States District Court rested upon Title 28, U.S.C. Sections 2241 (a), 2241 (c)(3) and 2242; the Fifth, Sixth and Fourteenth Amendments to the United States Constitution; and, Fay v. Noia, (1963), 372 U.S. 391. 83 S. Ct. 822.

Jurisdiction of this Court is invoked under Title 28, U.S.C. Sections 1291, 2241 (a), 2241 (c)(3) & 2253. Title 28, U.S.C. Federal Rules of Civil Procedure, Rule 81 (a) (?); and, the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

B. Opinions Below:

The opinion of the District Court of Appeal of the State of California, First District, Division One, handed down on November 30, 1965, and appears in the Official Reports at 238 CA 2d 447, 48 Cal. Rptr. 55. A copy of said opinion is attached hereto (Exhibit "A"). There was no written opinion by the Supreme Court of the State of California.

The opinion of the United States District Court for the Northern District of California was handed down on December 6, 1966. It is unpublished. A copy of said opinion is attached

hereto as Exhibit "B".

C. Statement of the Pleadings and Facts
Conferring Jurisdiction:

Appellant was charged by an information filed by the District Attorney of Alameda County on November 12, 1963, with the crime of a felony, to wit, Burglary, a violation of California Penal Code Section 459. Said information was filed in the Superior Court of the State of California, in and for the County of Alameda, in an action entitled, "THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. GRANT WILSON, Jr., Defendant", bearing no. 35373 in said Court.

After entering a plea of not guilty to the information, appellant was found guilty after trial by jury of the offense as charged on February 25, 1964. Thereafter, and on March 17, 1964, appellant was sentenced by the trial court as follows: Imprisonment in the State Prison for the term prescribed by law (i.e. 5 years to life), execution of said sentence suspended for the period of four years with a condition of probation that appellant serve one year in the Alameda County Jail.

Appellant served approximately two months of his aforesaid sentence in the Alameda County Jail and the trial court set bail on appeal, which said bail was posted. Upon posting the said bail, petitioner was released pending his appeal in the appellate courts of the State of California.

1 Timely notice of appeal was filed from said conviction
2 on March 17, 1964. Appellant's conviction was sustained by
3 Opinion of the District Court of Appeal, State of California
4 First Appellate District, Division One, filed on November 30,
5 1965. Said Opinion is officially reported in 238 C.A.2d 447,
6 48 Cal. Rptr. 55. Thereafter and on January 10, 1966, a
7 Petition for Hearing was filed with the Clerk of the Supreme
8 Court of the State of California and on January 16, 1966, that
9 Court entered its order denying said Petition.

10 On March 29, 1966, execution of the remainder of the
11 aforesaid judgment was ordered, bail was exonerated and
12 appellant was ordered into custody to serve the remainder of
13 his one year sentence in the Alameda County Jail.

14 On or about March 23, 1966, an application for stay
15 of execution of appellant's judgment pending application and
16 hearing on writ of certiorari was delivered to the Clerk of
17 the Supreme Court of the United States to be presented to Mr.
18 Justice William O. Douglas, Associate Justice of the United States
19 Supreme Court, and Circuit Justice for the Ninth Circuit. The
20 matter was presented to Mr. Justice Douglas by the Clerk of
21 the Supreme Court on March 29, 1966. Mr. Justice Douglas denied
22 appellant's application for stay of execution pending the filing
23 and disposition of a petition for a writ of certiorari in the
24 United States Supreme Court.

25 On April 5, 1966, a petition for a writ of habeas

1 corpus was filed in the United States District Court for the
2 Northern District of California (then Southern Division), being
3 Action No. 44981 in said Court and entitled, "GRANT WILSON, Jr.,
4 Petitioner, vs. FRANK MADIGAN, Respondent, THE PEOPLE OF THE
5 STATE OF CALIFORNIA, Real Party in Interest." On the same day,
6 an Application for Stay of Proceedings in State Courts and for
7 Bail Pending Hearing and Determination on Petition for Writ of
8 Habeas Corpus was filed in said action. An order to show
9 cause on the said Petition and Application was issued April 6,
10 1966 and directed to the Attorney General of the State of
11 California.

12 On April 14, 1966, a hearing was had on said order
13 to show cause before the said United States District Court,
14 the Honorable Alfonso J. Zirpoli, Judge Presiding. At said
15 time and place the petition for writ of habeas corpus was sub-
16 mitted by the parties to the Court and the said Court issued
17 its order setting bail in the amount of \$1,000 on habeas
18 corpus, ordered the appellant's release from state custody
19 forthwith, and stayed the execution of judgment as against the
20 State of California.

21 On June 28, 1966, the said District Court in said
22 action, issued and filed its order vacating submission of the
23 matter and directed the parties to file supplemental briefs
24 in light of the decisions of Miranda vs. State of Arizona,
25 No. 759, October Term, 1965 and Johnson vs. State of New Jersey

No. 762, October Term, 1965.

Thereafter the parties filed supplemental briefs, and on December 6, 1966, the said District Court issued and filed its order denying petitioner's petition for writ of habeas corpus, vacated its order releasing petitioner on bail and ordered appellant's return to the custody of respondent.

On December 16, 1966 appellant petitioned the said United States District Court for a certification of probable cause to appeal its aforesaid decision of December 6, 1966 to the United States Court of Appeal for the Ninth Circuit and for further relief to set aside and vacate the said Court's order setting aside and vacating stay of execution of sentence pending appeal.

Thereafter, and on December 15, 1966, pursuant to the provisions of 28 U.S. Code Section 2253 the said District Court issued its certificate of probable cause to appeal its order denying the petition for writ of habeas corpus (See Exhibit "C" attached hereto), said order being dated December 6, 1966, and on said date set aside and vacated its order setting aside and vacating the stay of execution of sentence pending appeal. Appellant was released from the custody of the respondent on bail in the sum of \$1,000.00.

Thereafter, and on January 4, 1967, a timely notice of appeal was filed in the aforesaid action in the United States District Court for the Northern District of California.

1 II

2 STATEMENT OF THE CASE

3 Evidence adduced at the trial herein and comments by
4 the prosecutor in his final argument:

5 After a telephone complaint to the Oakland Police,
6 responding officers converged on the area of 271 Vernon Street
7 in Oakland, California. Inspecting the premises, officers heard
8 noises, and two men ran from the garage area of the building.
9 They refused to obey one of the officers' commands to halt.
10 While searching the neighborhood in the direction the suspects
11 had gone, appellant emerged from between two buildings and
12 started to run. One of the officers commanded, "Stop, or I will
13 shoot" and appellant stopped. Officer Hoover drew his service
14 revolver and held appellant at gunpoint. Immediately thereafter,
15 Officer Fiege handcuffed the appellant. Appellant was breathing
16 hard, sweating heavily and appeared frightened. (T.R. 187-188,
17 254-255*)

18 After Officer Hoover had drawn his revolver and was
19 holding appellant at gunpoint, the officer was allowed to testify
20 over objection that the following transpired (T.R. 194):

21 "Q. What did you say?

22 A. I asked him (appellant) what his name was.

23 Q. What did he say?

24 A. He didn't say anything.

25 * Hereinafter "T.R." will refer to the Trial Record.

1 "Q. Any other questions by you?

2 A. I asked him where he was going in such a hurry.

3 Q. What did he say, if anything?

4 A. He didn't say anything."

5 Immediately thereafter, Officer Fiege handcuffed
6 appellant and ordered him into the back of the police car and they
7 returned to 271 Vernon Street (T.R. 132). Over objection by
8 trial counsel for appellant, Officer Fiege was allowed to testify
9 that he had the following conversation with appellant in the
10 police car at 271 Vernon Street (T.R. 133-138, 140-143):

11 "DISTRICT ATTORNEY: Q. All right what did you
12 say to the defendant? What was the conversation,
Officer?

13 A. I asked the defendant (appellant) his name.
14 He did not answer. I asked him his address, he
15 did not answer. I asked him if he lived in that
16 area. He did not answer. I asked him who he
17 had been with. He did not answer. I asked him
18 if there was anybody in that area that I could
19 contact to clear him, and he still did not answer."

20 Shortly thereafter, Officer Hoover came to the patrol
21 car in which appellant was sitting, handcuffed, and stated (T.R.
22 142-143):

23 "There had been a burglary committed at 271 Vernon
24 Street."

25 Then Officer Fiege testified:

"I told the defendant (appellant) that there
was a burglary in that building and that he
was under arrest for investigation of burglary
and I asked him if he had anything to say for
himself. I repeated this twice. On the third

1 "time, he said, his answer was, 'was there a
2 burglary committed in that building?' (T.R.
143)

3 Officer Fiege testified further as to all the remainder
4 of any conversation between him and appellant. (T.R. 143):

5 "The only thing I did say was that we would
6 have to book him without a name because he
7 would not give us his name or address or
anything else."

8 At no time was appellant advised of his Fifth Amendment
9 privilege against self-incrimination. At no time was appellant
0 advised of his Sixth Amendment rights to counsel and to remain
1 silent.

2 Among the following are some of the comments made by
3 the prosecutor in his final argument:

4 "(Hoover commanded appellant) 'Stop, or I will
5 shoot', and the man stopped. So (Hoover) walks
6 up and says (to appellant), 'What is your name?'
7 This is an innocent man, mind you, and he didn't
8 know anything about the law; just a grand guy
9 out there in the street. 'What is your name -
10 where are you going in such a hurry, buddy?'
11 Not a response. (T.R. 398). He won't even
12 say his name; won't even give his name.'
13 (Emphasis added.)

14 "(After appellant was handcuffed, the officers
15 asked him), 'What is your name?' Nothing.
16 'What is your address?' Nothing. 'Who are you
17 visiting; why were you here?' Nothing. Then
18 Mr. Hoover, Officer Hoover comes out and says,
19 'We find a door has been opened.' This is the
20 door to Agent Wilkins' apartment. 'We find a
21 door has been opened.' So right then, now, we
22 have got something. Hoover told that in front
23 of this man and the officer said, 'You are
24 accused of burglary of that apartment and that
25 building.' to which he said nothing. * * * you

1 "have got him (appellant) in the face of an
2 accusatory statement not saying anything."
3 (T.R. 401) (Emphasis added.)

4 "* * * But the critical thing is he (appellant)
5 is willing to talk now when he wasn't that
6 night (of the arrest) * * *" (T.R. 402)
7 (Emphasis added.)

8 "* * * That man knew in advance what to do -
9 for example, not to talk to police officers."
10 (T.R. 424)

11 "Unexplained possession of stolen property means
12 at the time when he was caught. This when
13 it is important, and not now. This is when you
14 know; that's when a man has to think on his feet.
15 And this man had it licked. He said nothing.
16 This is the best, frankly. If any of you would
17 be a burglar, that is the thing to do, say
18 nothing. That's just what he did." (T.R. 423)
19 (Emphasis added.)

20 Other and similar comments by the prosecutor in his
21 final argument can be found at pages 389, 390, 404, 407 and 428
22 of the Trial Record.

23 III

24 SUMMARY OF OPINIONS BELOW

25 A. Holding of California:

26 The District Court of Appeal, State of California,
First Appellate District, Division One held in its opinion (Op.,
Exhibit "A").

1. Evidence of questions propounded to appellant by
interrogating officers and his ensuing conduct was properly ad-
mitted in that his silence in the face of questioning was "mere
non-assertive conduct; * * * not a declaration but a failure to

offer an explanation, under circumstances which call for one, which in turn gives rise to an inference and consciousness of guilt," (Op. 9), and his failure to deny an accusation when advised that he was under arrest for investigation of burglary added the element of an "adoptive admission that the charge was true." (Op. 10).

2. California Penal Code Section 647(e) makes it a criminal offense for a person to loiter or wander upon the street from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer to so do. It then concludes that if there is such a right to interrogate, the "results of such interrogation should be available * * * (herein) (Op. 12)

3. The Dorado (62 C.2d 350) proscription was not applicable herein in that the burglary for which appellant was arrested was discovered during appellant's interrogation; and, that the interrogation of appellant while he was under gunpoint, handcuffed and in the police car did not fall within Dorado in that "they (the police) were affording him an opportunity which police officers normally and routinely offer to any person whom they are taking into custody to give any explanation of his conduct which he may desire to give." (Op. 13-16)

4. Griffin v. California, 380 U.S. 609, does not require a reappraisal of the rule which permits evidence of

conduct, more particularly of silence, of the defendant to be admitted as evidence of consciousness of guilt. (Op. 15-16)

B. Holding of the United States District Court:

The United States District Court for the Northern District of California, the Honorable Alfonso J. Zirpoli, Judge presiding, held in its opinion (U.S. Op.*):

1. Appellant's federally protected constitutional rights were not denied him "* * *" when the prosecution introduced evidence of his silence in response to accusatory questions as an admission by silence "* *" in that appellant's trial commenced February 20, 1964. (U.S. Op., page 2) In making this holding the Court stated that it is now clear that silence of an individual under police custodial interrogation cannot be used against him in a criminal trial, citing Miranda v. Arizona, 385 U.S. 719 (1966), and held that appellant was not entitled to the benefit of the statement of law in Footnote 37 in Miranda. (U.S. Op., pages 3, 4 and 5). In this regard it held further that the rule of "prospective application" for the holding in Griffin v. California, 380 U.S. 609 (1965), as set forth in Tehan v. Shott, 382 U.S. 406 (1966), is not applicable to appellant and that Footnote 37 "* * *" is considered a part of the holding in Miranda "* *" and that the reference therein "* *" to Griffin v. California, supra, is merely by way of analogy

* "U.S. Op." hereinafter will refer to Judge Zirpoli's opinion, Exhibit "B".

* * *". (U.S. Op., pages 4 and 5).

2. It made no finding and expressed no view as to whether appellant was in custody at the time the interrogation was conducted. (U.S. Op., page 3)

3. It cited People v. Simmons, 28 Cal.2d 699 (1947) and applying the test set forth therein stated:

"* * * It seems clear that the State itself conceded that petitioner (appellant) was invoking his privilege against self-incrimination. The record is replete with comment by the prosecutor on the silence of the defendant. Two of the more startling examples of comment by the prosecutor are:

'What is your name? This is an innocent man, mind you, and he didn't know anything about the law; just a grand guy out there in the street.'" (T.R. 398) (Emphasis added.)

"* * * That man knew in advance what to do - for example, not to talk to police officers." (T.R. 23) (Emphasis added) (U.S. Op., page 5)

Then the United States District Court made this startling observation:

"It is surprising to this Court that the state courts found that the above comments did not violate the rule laid down in the Simmons case; but the question is one of state law, not federal law, since petitioner cannot come within the date for prospective application of Miranda." (U.S. Op., page 6)

IV

SPECIFICATION OF ERROR

THE UNITED STATES DISTRICT COURT ERRED IN HOLDING THAT APPELLANT WAS NOT ENTITLED TO THE BENEFIT OF

1 THE RULE OF PROSPECTIVE APPLICATION OF GRIFFIN VS.
2 CALIFORNIA ACCORDING TO TEHAN VS. SHOTT. IT FURTHER
3 ERRED IN HOLDING THAT JOHNSON VS. NEW JERSEY CONTROLS
4 HEREIN RE PROSPECTIVE APPLICATION OF MIRANDA VS.
5 ARIZONA.

6 V

7 ARGUMENT

8 The rules of Miranda v. Arizona, 384 U.S. 436, 86 S.
9 Ct. 1602 (1966), and Johnson v. New Jersey, 384 U.S. 719, 86
10 S.Ct. 1772 (1966), have application to the case at bench only
11 insofar as Miranda aids in the interpretation of Griffin v.
12 California, 380 U.S. 609, 85 S.Ct. 1229 (1965). Appellant falls
13 within the holding of Griffin and is entitled to habeas corpus
14 thereunder by its proper prospective application as delineated
15 by Tehan v. United States Ex rel. Shott, 382 U.S. 406, 86 S.Ct.
16 459 (1966).

17 Inherent in the decision of the United States District
18 Court (Exhibit "B") is the underlying feeling that appellant
19 has not been treated fairly by the Courts of the State of
20 California and that the District Court's order was commanded
21 by the holding in Miranda v. Arizona, supra, and Johnson v.
22 New Jersey, supra. The United States District Court recognized
23 that appellant's liberty depends upon the interpretation it
24 placed upon the language in Footnote 37 in the majority opinion
25 of Miranda v. Arizona, 384 U.S. 468, 86 S.Ct. 1624. It does

1 not appear that the language in said footnote has been interpreted
2 by any federal court other than by the opinion of Judge Zirpoli
3 herein below. (See copy of Petition for Certificate of Probable
4 Cause filed in the United States District Court and part of the
5 record on appeal herein.)

6 If, as the United States District Court contends, this
7 case is controlled solely by the holding in Miranda, and not by
8 Miranda in clarifying and restating Griffin, appellant has no
9 standing before this Court due to the rule of prospective appli-
10 cation as set forth in Johnson v. Maryland, supra.

11 On the other hand, if Footnote 37 merely clarifies
12 and restated the holding in Griffin, the United States District
13 Court erred and should have applied the prospective application
14 rule of Tehan, supra, and should have issued a writ of habeas
15 corpus to appellant.

16 The pertinent part of the aforesaid Footnote 37 states:

17 "In accord with this decision, it is
18 impermissible to penalize an individual for
19 exercising his Fifth Amendment privilege
20 when he is under police custodial interro-
21 gation. The prosecution may not, therefore,
22 use at trial the fact that he stood mute or
23 claimed his privilege in the face of accusa-
24 tion. Cf Griffin vs. California, 380 U.S.
25 609, 85 S.Ct. 1229 ***"

26 According to Webster's New Collegiate Dictionary,
27 Abbreviations Used In This Work, "Cf" is the abbreviation for
28 "confer (L. compare)". "Confer" is defined as "To compare; now
29 only in the imperative."

1 The Court in Miranda does not contrast or differentiate
2 Griffin, but, rather, it compares. Thus it represents as
3 similar and likens the footnote to its holding in Griffin.

4 Griffin compels the issuance of a writ of habeas corpus
5 herein.

6 In Miranda, certain new guidelines are set forth for
7 constitutional law enforcement (e.g., the necessity of providing
8 an attorney at no expense to a suspect)

9 The Court also makes certain many points which were
10 somewhat ambiguous in prior opinions. It defined what it meant
11 in Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, when it
12 spoke of an investigation which had focused on an accused. It
13 set forth in particularity the three required admonitions which
14 must be made to a suspect from its opinion in Escobedo, (1) to
15 warn him of his right to remain silent, (2) to inform him of
16 his right to consult with an attorney prior to making a state-
17 ment, and (3) to inform him that anything he says will be used
18 against him in a Court of Law. It further stated that the right
19 to an attorney could not depend upon a request (as California
20 defined Escobedo in People vs. Dorado, 62 Cal.2d 338).

21 In Footnote 37 of Miranda, the Court followed the
22 latter concept and merely defined and made certain that which
23 could be considered as ambiguous in Griffin. The Court did not
24 make new law in Footnote 37.

25 Thus, when Johnson v. New Jersey, supra, is applied

1 to the present case, the rule as to prospective application as
2 set forth in Tehan vs. United States Ex rel. Shott, 382 U.S.
3 406, 86 S.Ct. 459, applies.

4 The basic concept of the Court in Escobedo that there
5 is a right to counsel before arraignment as well as after
6 arraignment is woven through the reasoning of Griffin. In the
7 case at bench, the proscribed comments of the Court or prose-
8 cutor are the same for acts of the defendant within the court-
9 room as well as acts of the defendant prior to trial.

0 The rule of prospective application herein is set
1 forth in Tehan v. United States Ex rel. Shott, supra, (to wit
2 Griffin) does not apply to cases where (a) judgment of convic-
3 tion is final and (b) the availability of appeal in the State
4 Courts has been exhausted, and (c) time to file a petition for
5 certiorari has passed (or certiorari denied), all prior to
6 April 29, 1965 (the effective date of Griffin).

7 Herein, the State Courts had not finally decided the
8 matter prior to the United States Supreme Court's holding in
9 Griffin.

0 VI

1 CONCLUSION

2 WHEREFORE, appellant respectfully submits that the
3 Order of the United States District Court denying his Petition
4 for Writ of Habeas Corpus should be reversed for the reasons
5 stated heretofore, and for such other and further relief as this

1 Court deems meet and proper in the premises.

2 DATED: August 7, 1967.

3
4 EDWARD L. CRAGEN and
JOHN J. FAHEY

5
6 By _____
7 EDWARD L. CRAGEN
8 Attorneys for Appellant
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPENDIX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBIT "A"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT - DIVISION ONE

64-407

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
ANT WILSON, JR.,
Defendant and Appellant.

RECEIVED
ATTORNEY GENERAL
Dec 1 9 00 AM '65
DEPARTMENT OF JUSTICE
SAN FRANCISCO OFFICE
1 Crim.

Following a jury verdict finding defendant guilty of
glary in the first degree in violation of section 459 of the
al Code, he was sentenced to be imprisoned in the state prison
r the term prescribed by law. Execution of sentence was sus-
nded and he was placed on probation for a period of four years
on terms and conditions which included serving a term of one
ar in the county jail. Defendant has appealed from the final
dgment of conviction, from the sentence imposed, and from an
der denying a motion for a new trial. Although the propriety
the order denying a motion for a new trial may be reviewed on
he appeal from the judgment, no appeal lies from it as such, so
he purported appeal from that order must be dismissed. (Pen.
ode §1237.) The appeal from the sentence is merged in that from
he judgment. (Id.) and see People v. Sweeney (1960) 55 Cal. 2d
7, 33.)

Defendant contends that the trial court erred in admitting
testimony of "conversations" had with the defendant. Because there
is only one statement of the defendant involved, the question is

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT - DIVISION ONE

64-407

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ANT WILSON, JR.,

Defendant and Appellant.

Dist. Court of App. 1st Dist.
NOV 20 1965
LAWRENCE H. ...
1 Crim.
RECEIVED
ATTORNEY GENERAL
DEC 1 9 00 AM '65
DEPARTMENT OF JUSTICE
SAN FRANCISCO OFFICE

Following a jury verdict finding defendant guilty of burglary in the first degree in violation of section 459 of the Penal Code, he was sentenced to be imprisoned in the state prison for the term prescribed by law. Execution of sentence was suspended and he was placed on probation for a period of four years upon terms and conditions which included serving a term of one year in the county jail. Defendant has appealed from the final judgment of conviction, from the sentence imposed, and from an order denying a motion for a new trial. Although the propriety of the order denying a motion for a new trial may be reviewed on the appeal from the judgment, no appeal lies from it as such, so the purported appeal from that order must be dismissed. (Pen. Code §1237.) The appeal from the sentence is merged in that from the judgment. (Id., and see *People v. Sweeney* (1960) 55 Cal. 2d 27, 33.)

Defendant contends that the trial court erred in admitting testimony of "conversations" had with the defendant. Because there is only one statement of the defendant involved, the question is

more properly framed as whether or not the trial court was justified in admitting evidence of questions propounded to the defendant, together with evidence of the lone answer to one and his failure to answer the remaining questions, on the grounds that such evidence either showed acquiescence of the defendant in the truth of the statement, or indicated his consciousness of guilt. For reasons hereinafter set forth the rulings of the trial court are upheld.

The defendant contends that it was error to admit in evidence certain articles found on his person which were not shown to have been actually connected with the burglary which in fact occurred; that it was error for the prosecutor to maintain these articles in view of the jury prior to their introduction in evidence; and that the prosecutor committed prejudicial error in referring in his argument to an article which was not admitted in evidence. A review herein of the circumstances of this case reflects that all of the articles were properly before the jury and no error can be predicated on any of the foregoing propositions.

Defendant does not contend that the evidence is insufficient to sustain his conviction. It is, however, necessary to recount it in substance so that the matters complained of can be viewed in proper perspective. This is particularly true insofar as it is contended that certain police action violated defendant's prearrestment right to be advised of his rights to counsel and to remain silent. (See *People v. Stewart* (1965) 62 Cal. 2d 571, 579.)

The victim, a United States Treasury Agent, testified that he lived in apartment 002 of a three-story apartment building with approximately 20 units at 271 Vernon Street in Oakland; that his apartment was the rear one of two on a floor below the level of Vernon

street, but above the carport area in the back of the apartment.

On Friday, September 13, 1963, at about 7:00 p.m., he left the apartment for the weekend, turned off the lights, and locked the door. Keys to the apartment were held by himself, the manager and his wife, who was away during all of the period involved. Although the bed was not made up, generally everything was in order in the apartment.

Early the following morning, at 3:30 a.m. on September 14th, pursuant to directions received on the police radio, three officers converged on the premises at 271 Vernon Street. Officer Lusk, the first to arrive, talked to a man coming out of the driveway of the premises and went down the driveway into a garage area under the apartment building. He continued on through a door to the back of the building to another parking area under the apartment and checked the automobiles there. Officer Hoover, who pulled up as Lusk was getting out of his car, walked over and talked to the reporting party in the driveway with Lusk. While he was still there Officer Fiege arrived and joined the conversation. Hoover went down to check cars in the subterranean garage.

Fiege went searching down through the garage and out the same door through which Lusk had exited toward the rear of the building. He descended some stairs which led to a back driveway leading to the carports under the apartment. Just before he entered the driveway he heard a commotion of feet moving in the driveway and around the side of the building. He stepped around the corner, showed his flashlight in the direction from which he had heard the noise, and saw the lower half of a man going in the doorway in the middle of the building. He shouted, "Come out of there," went to the doorway

and observed two men going through a doorway at the top of some stairs at the end of a hall. He got to the top of the stairs in time to see the two men running down another hallway. He observed that they both had on dark clothes and that the rearmost of the two men had black gloves on and some kind of black cloth in his left rear pocket. The man in front seemed to have a suit coat on, and the other a knit-type sweater. Fiege was running and shouting "Halt," but the men did not halt. They ran out of the building, turned right on Vernon Street and turned off Vernon Street into a driveway.

Meanwhile Lusk, who was also in the rear of the building, had heard Fiege's shouts. He turned and saw Fiege starting up the stairway. He ran over and saw Fiege at the first landing with someone running ahead of him. Lusk doubled back around the side of the building, and by the time he came to the street there was no one there.

Hoover, who was just about to go through the door from the subterranean garage to the rear, heard the shouts and sounds of running to the rear of the building. He ran toward the street and as he came up the stairway saw "people" running south on Vernon with Officer Fiege running after them. He chased them down Vernon Street and saw one turn in the driveway.

Fiege, who was tired, gave up the chase at the point where Hoover overtook him, and returned to his patrol car. Hoover ran into the driveway and stopped momentarily in a parking area. He heard sounds to the south and to the west, and followed those which he believed to be the closer. Upon arriving at a stairway he saw a person descending and yelled, "Stop, police." The suspect turned north on reaching the street at the foot of the stairs, and Hoover, on arriving at the same street, observed him run northbound and turn

to the left between two buildings. At this point Fiege drove by, conversed with Hoover and continued around the block. Hoover again saw the suspect as the latter emerged from between the two buildings and started to run across a traffic island. When the officer again yelled, "Stop, or I will shoot," he stopped. Hoover held him, now identified as the defendant, at gun point. He was joined by Officer Dorsey who handcuffed the defendant and in less than a minute Fiege came on the scene.

Both Fiege and Hoover noticed that the defendant was out of breath and sweating profusely, and according to Hoover, he appeared to be frightened. He was attired in a white shirt with a dark sweater which was tucked in at the collar, dark pants, dark shoes and no socks. He had black leather gloves on, and held a silver pen-light in his hand.

At the trial Hoover was asked to relate any conversation he had with the defendant at this point. After objection was overruled the following transpired: "Q. ... What did you say? A. I asked him what his name was. Q. What did he say? A. He didn't say anything. Q. Any other questions by you? A. I asked him where he was going in such a hurry. Q. What did he say, if anything? A. He didn't say anything."

Hoover then searched the defendant and found the following three pairs of socks - gray, black and brown argyle - and a black silk sack in his left rear pants pocket; a second small pen-light in the sack; a black Navy watch cap in the right front pants pocket; a pair of bolt cutters with the handles cut off in his right rear pants pocket; and three plastic strips in his only shirt pocket. Defendant bore no wallet, credit cards or other cards indicating his identification.

He had nothing else on his person other than a normal man's white handkerchief and money amounting to seven or eight dollars.

Fiege placed the defendant in his patrol car and returned to park in front of 271 Vernon Street. Hoover retraced his steps in a vain search for anything that might possibly have been thrown away. Meanwhile Lusk had been looking around the apartment building and found the door of apartment 002 open two or three inches. The apartment was dark and no one responded when he rang the bell. He went out to the front to get another officer to enter the apartment with him.

Lusk met Hoover, who had returned to the apartment building, and they returned and entered apartment 002. They observed three jewelry boxes and the scattered contents thereof on the bed, and drawers of a dresser standing open.

At the trial Fiege was interrogated as to what transpired in the police car and, after defendant's objection was overruled, testified as follows: "Q. All right, what did you say to the defendant; what was the conversation, Officer? A. I asked the defendant his name. He did not answer. I asked him his address. He did not answer. I asked him if he lived in that area. He did not answer. I asked him who he had been with. He did not answer. I asked him if there was anybody in the area that I could contact to clear him, and he still did not answer."

The witness continued: "This took a few minutes. I was interrogating him and Officer Hoover came to the side of the car and said, 'There was a burglary committed in that building.'"

These remarks were stricken pending presentation of further foundation and argument which ended in the overruling of defendant's

objection, and the examination continued as follows: "Q. What did Officer Hoover say? A. Officer Hoover told me that there had been a burglary committed in 271 Vernon Street. Q. Did you have further conversation with the defendant at that time? A. I did. Q. What did you say and what did he say? A. I told the defendant that there was a burglary in that building and he was under arrest for investigation of burglary, and I asked him if he had anything to say for himself. I repeated this twice. On the third time he said, his answer was, 'Was there a burglary committed in that building?'"

According to the officer the only other remark which was passed to or from the defendant was, in the witness' words: "The only thing I did say was that we would have to book him without a name because he wouldn't give us his name or address or anything else."

Lusk returned to the apartment with the manager, locked it up and left a note for the tenant. The victim returned to the apartment about 1:00 p.m. on Sunday, September 15th. He found the jewelry boxes lying dumped over with their contents spread out over the bed, and discovered that a gun and handcuffs had been taken from the top drawer of a chest of drawers. Subsequently, after examining the articles held by the police, he discovered that the pair of black stretch socks and the pair of brown argyle socks with a small hole were missing from the third drawer of the same chest. Nothing else was missing from the apartment.

An experienced burglary investigator testified that he was familiar with tools used by burglars in practicing their trade or profession; that the bolt cutters, the handles of which had been shortened, and the isinglass or plastic strips are burglary tools;

that he had opened both a door to the apartment building and the door to apartment 002 by use of one of the strips; that a plastic strip when so used usually does not leave a mark; and that the bolt cutters if used to cut a night chain, or as a prying instrument, would leave a mark. There were no night chains on any of the apartment doors in question, and the record is devoid of any evidence to show that any marks were found.

The defendant testified that he and his wife had arrived in Oakland about midnight September 13, 1963 on the return trip to his home in Los Angeles from a visit to his ailing father in Camas, Washington; that with his brother and the latter's wife, who came in another car, they took separate rooms at the Fairview Motel, about six or eight blocks away from where he was apprehended; that being unable to sleep, he went for a walk, found the black bag, and was examining its contents - trying the gloves for fit, and putting things in his pockets as he pulled them out - when he heard a commotion; that he looked up and saw two men running, and he started to run; and that when they identified themselves as officers, he stopped and was taken into custody. He denied he had ever been in apartment 002 at 271 Vernon Street, and stated that the three pairs of socks found in his pocket came from the black bag he had picked up.

He denied that Officer Hoover was present at the scene of his original apprehension, and that any officer questioned him at that point. He stated that when questioned in front of the premises he told the officers he was not a burglar and denied vehemently that he had anything to do with a burglary. He admitted that he failed to answer questions concerning his name and address, and that he had not given the officers the account of his activities he recited from the

itness stand.

His wife verified his activities to and including their registering at the motel in Oakland, and two former fellow employees touched for his character.

I. Evidence of the questions propounded to defendant and his ensuing conduct was properly admitted.

Defendant assumes that all of the questions propounded to defendant by both officers are accusatory statements, and that it was error to admit them and his conduct in response thereto because of his right to remain silent under the federal and state Constitutions. He appeals to three separate, although related, legal principles, as demonstrating the error of the trial court (see People v. Simmons (1946) 28 Cal. 2d 699, 721; People v. Dorado (1965) 62 Cal. 2d 338, 342-357; and Griffin v. California (1965) 380 U.S. 609), but no one of them is controlling here.

Before examining his arguments it is proper to analyze the nature of the evidence of which complaint is made. The questions directed to defendant concerning his name, where he was going in such a hurry, his address, whether he lived in the area, with whom he had been, and whether there was anyone in the area the officer could contact to clear him, contain no accusations which are converted into adoptive admissions by the defendant's silence, unless resort be had to the fact, which was conceded by all, that he was in a hurry when apprehended. The silence here is mere nonassertive conduct; it is not a declaration but a failure to offer an explanation, under circumstances which call for one, which in turn gives rise to an inference of consciousness of guilt. (See Cal. Evidence Code (1965) §§ 225, subd. (b) and 1200, and Comment, §1200; cf. 2 Wigmore, Evidence,

§§273, 276, pp. 106-111; and Witkin, Cal. Evidence, §214, p. 239; with 4 Wigmore, Evidence, §§1071-1072, p. 70, et seq.; and Witkin, Cal. Evidence, §§235-237, pp. 266, et seq.)

On the other hand the failure to deny the accusation, when Fiege advised the defendant that he was under arrest for investigation of burglary, and asked him if he had anything to say for himself, could give rise not only to an inference of consciousness of guilt, but also an adoptive admission that the charge was true. (See Code Civ. Proc., §1870, subd. (3); Cal. Evidence Code (1965) §1221; and texts last cited.)

(A) In *People v. Simmons*, supra, 28 Cal. 2d 699, at page 721, the opinion points out it is an abuse of discretion on the part of the trial court to admit statements of the defendant's woman friend and a codefendant which tended to incriminate defendant where it was obvious from his responses, on being confronted with these statements - "I told you all I am going to tell you," etc. - that he was attempting to exercise his constitutional privilege against self-incrimination. (See also *Martinez v. Superior Court* (1964) 224 Cal. App. 2d 755, 757-759.)

The opinion lays down the general rules as to the use of accusatory statements as follows: "Accusatory statements of the character here involved are plain hearsay. They may properly find their way into the record only as admissions, under the familiar exception to the hearsay rule. If the accused responds to the statement with a flat denial, there is no admission and hence nothing that may be received in evidence. If, on the contrary, the truth of the statement is admitted, the statement may properly be introduced. A third situation is presented when the accused stands mute in the face

the accusation or responds with an evasive or equivocal reply. In that situation this court has held that under certain circumstances both the statement and the fact of the accused's failure to deny are admissible on a criminal trial as evidence of the acquiescence of the accused in the truth of the statement or as indicative of a consciousness of guilt.

"The theory underlying this rule is that the natural reaction of an innocent man to an untrue accusation is to enter a prompt denial. Where his response is silence, evasion, or equivocation, it is for the trial court to determine in the first instance whether the accusation has been made under circumstances calling for a reply, whether the accused understood the statement, and whether his conduct or response was such as to give rise to an inference of acquiescence or guilty consciousness. Where the trial judge determines that such an inference may be drawn, the statement is then admitted, not as substantive evidence in proof of the fact asserted but merely as a basis for showing the reaction of the accused to it." 28 Cal. 2d pp. 712-713; see also *People v. Whitehorn* (1963) 60 Cal. 2d 256, 261-262; *People v. Davis* (1957) 48 Cal. 2d 241, 249-250; *People v. Davis* (1954) 43 Cal. 2d 661, 669-672; *People v. De Leon* (1965) 236 A.C.A. 582, 587; *People v. Stewart* (1965) 236 A.C.A. 27, 33; *People v. Atwood* (1963) 223 Cal. App. 2d 316, 329-331; *People v. Flynn* (1963) 217 Cal. App. 2d 289, 295-296.)

Here the court properly passed on the admissibility of the evidence and the jury was correctly instructed, substantially as suggested in Whitehorn (60 Cal. 2d at p. 261, fn. 1), and in Atwood (223 Cal. App. 2d at p. 328, fn. 5). No violation of Simmons appears on the record. Defendant suggests that the defendant's silence is of

itself an indication of his claim to the constitutional privilege against self-incrimination, and that therefore no accusatory statement or other question can be used. This argument was made and rejected in Flynn (217 Cal. App. 2d at p. 296; and see Atwood, 223 Cal. App. 2d at p. 331).

Furthermore, as pointed out above the only implied admission used against him was that arising from his failure to deny the accusation after the burglary was discovered. It is recognized that, "There is, of course, nothing unreasonable in an officer's questioning persons outdoors at night [citations], and it is possible that in some circumstances even a refusal to answer would, in the light of other evidence, justify an arrest. [Citation.]" (People v. Simon (1955) 45 Cal. 2d 645, 650.) The cases setting forth the California rule permitting temporary detention for questioning are set forth in People v. Machel (1965) 234 A.C.A. 38, 44-45. In fact since 1961 it has been provided by statute: "Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor; ... (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." (Pen. Code, §647, subd. (e); and see People v. Bruno (1962) 211 Cal. App. 2d Supp. 855, passim.) If there is such a right to interrogate, the results of such interrogation should be available where they reflect conduct on the part of the defendant which tends to establish his guilt unless there is a supervening policy of the law which prevents the use of the conduct or statements

of the accused.

(B) Defendant contends that the principle established in *People v. Dorado*, supra, 62 Cal. 2d 338, 342-357, which precludes the use of a defendant's statements against him under the circumstances therein outlined, now prohibits the use of a defendant's silence under similar circumstances. This, of course, may well be true in regard to any adoptive admission or attempt to use the defendant's silence or evasive conduct to show that the declarations of another are true. (See *People v. De Leon*, supra, 236 A.C.A. 582, 588-590; *People v. Stewart*, supra, 236 A.C.A. 27, 30-34.) The juxtaposition of Simmons and Dorado was envisioned by Justice Carter in the former case when he suggested that the defendant when being interrogated in the accusatory stage should be cautioned that his reaction to an accusatory statement would be used against him. (28 Cal. 2d pp. 718-719.) Stewart points out that it is inconsistent to state on the one hand that the defendant should be advised of his constitutional right to remain silent, and yet at the same time permit that silence to be used against him as evidence of his guilt. (236 A.C.A. at p. 33.)

The facts here, however, do not come within the proscription of Dorado. The defendant was in custody, either under arrest, or perhaps, until the burglary was discovered, merely being detained for investigation. The investigation had focused on him, although at the outset it may not have been clear just what, if any, offense had been committed. He was not effectively informed of his right to counsel and of his right to remain silent. He had not waived those rights, and in fact did remain silent for reasons which were unexpressed and best known to himself.

Two circumstances distinguish this case from Dorado and

from Stewart and De Leon. Because the questions propounded to defendant before the discovery of the burglary were not accusatory statements, there is no attempt to foist the declarations of others on the defendant as his own admissions. The defendant's failure to respond to inquiries concerning his name, address, destination, companions, if any, and acquaintanceship in the neighborhood is, as pointed out above, in no sense the adoption of declarations of another. No declarations or statements of the defendant are involved, and his silence cannot be distinguished in this regard from his other non-assertive conduct in fleeing from the scene and twice previously refusing to obey the officers' commands to halt.

Circumstances may be imagined where answering the type of question here involved would violate the provision against self-incrimination which has been extended to nontestimonial compulsion. (See *People v. Dorado*, supra, 62 Cal. 2d at p. 352, applying *Escobedo v. Illinois* (1964) 378 U.S. 478 ; and *People v. Stewart*, supra, 36 A.C.A. 27, 30.) *Dorado*, however, recognizes: "Nothing that we have said, of course, should be interpreted to restrict law enforcement officers during the investigatory stage from securing information from one who is later accused of the crime or from obtaining answers to their questions." (62 Cal. 2d at p. 354.) So here appears a second distinction between the facts of this case and those of Dorado, Stewart and De Leon. The circumstances here reflect that at the time the preliminary questions were asked the officers did not know what crime, if any, had been committed. The questions were not designed to elicit incriminating statements, but to afford the defendant an opportunity to explain his presence and actions. Therefore, even if the probative facts elicited be deemed extrajudicial statements, as

distinguished from nonassertive conduct, they are admissible as admissions obtained before the authorities had commenced a process of interrogation that lent itself to eliciting incriminating statements. In *People v. Cotter* (1965) 63 A.C. 404, 411, the opinion recites: "The more crucial conversation (the fourth) with the officers in the police car, was admissible for the further reason of absence of one of the conditions deemed essential to render the statement inadmissible under the rules laid down in Escobedo, Dorado and Stewart. Clearly, the statement made in the police car was not the product of a process of interrogation aimed at eliciting incriminating statements from defendant. The police merely asked him what had happened at the Buus residence. They were affording him an opportunity which police officers normally and routinely offer to any person whom they are taking into custody to give any explanation of his conduct which he may desire to give. It is a routine means of commencing an investigation."

If the defendant's express admissions at this stage of the investigation may be admitted, he should also be held accountable for such "admissions" as properly may be inferred from his conduct. The foregoing principle not only covers the evidence of the original interrogation by both officers to which defendant failed to respond, but also the original question after the burglary was discovered when he was asked if he had anything to say for himself and ultimately allegedly responded, "'Was there a burglary committed in that building

(C) Finally defendant contends that *Griffin v. California*, *supra*, 380 U.S. 609, requires a reappraisal of the rule which permits evidence of conduct, more particularly silence, of the defendant to be admitted as evidence of consciousness of guilt. (See *People v.*

Stewart, supra, 236 A.C.A. 27, 30-31.) Griffin holds that the Fifth Amendment privilege against self-incrimination is violated by a rule which permits comment on the defendant's failure to take the stand and testify in his defense. The rule on its face does not apply to commentary on defendant's conduct prior to the trial. It is already established by Simmons that no inferences may be drawn from an accused's failure to offer an explanation where he rests it on the privilege to remain silent. Dorado, as noted above, extends the prohibition to the situation where the elements of that case are present either because the defendant was warned of his right to remain silent and so rests on that privilege, or because he should have been warned of that right and the failure to warn taints all that is elicited from the accused thereafter. Nothing in Griffin requires the rejection of the inference to be drawn from the accused's nonassertive conduct, or from his silence prior to the accusatory stage when it is not rested on constitutional grounds. The considerations of reasonable investigation, sanctioned by Dorado, should control.

II. The items found in defendant's possession were admissible in evidence.

Defendant contends that of the items found in his possession only the socks should have been admitted in evidence. This objection goes to the black silk sack, black gloves, the pen-lights - one in his hand and one in the sack - the watch cap, the bolt cutters and the three plastic strips. The court excluded the bolt cutters, and defendant's argument is confined to the plastic strips, so the remaining articles do not require individual attention. Although the bolt cutters themselves were not admitted into evidence, the testimony that they were found on the defendant's person was never stricken. The propriety of the action of the prosecution in establishing and subse-

quently referring to defendant's possession of this tool is involved.

"As a general rule, physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation." (People v. Bannon (1922) 59 Cal. App. 50, 56; and see Code Civ. Proc. §1954; People v. Trujillo (1948) 32 Cal. 2d 105, 115; People v. Green (1939) 13 Cal. 2d 37, 43; and People v. Lindsay (1964) 227 Cal. App. 2d 482, 497-501.)

An early decision of the Supreme Court upheld the admission and exhibition as evidence of burglarious tools which were found in the defendant's carpet bag at the time of his arrest, because the record failed to show that they did not tend to connect the defendant with the burglary in question. The court stated:

"Burglarious tools found in the possession of the defendant soon after the commission of the offense may be offered in evidence whenever they constitute a link in the chain of circumstances which tend to connect the defendant with the commission of the particular burglary charged in the indictment. But before they can be received it must be shown that the burglary charged was in fact committed. When this has been done nothing remains but to ascertain who was the guilty party; or in other words to connect the defendant with the burglary thus established. It rarely happens that this can be done by the direct evidence of witnesses who saw and recognized the defendant in the act; hence in a majority of cases a resort must be had to circumstantial evidence, and any circumstances of which it can be reasonably affirmed that they form links in a chain which tends to connect the defendant with the commission of the burglary are competent evidence against him; but circumstances of which this cannot be affirmed

are not. Hence the possession of burglarious tools at or about the time the burglary was committed may or may not be a material fact and competent for the prosecution to prove, and whether it is or not depends necessarily upon the other circumstances of the case. In order to render it material there must be a possible and probable connection between it and the other circumstances given in evidence. If it appears from the other evidence in the case that the defendant was in the vicinity at or about the time the burglary was committed and that it was committed by the aid of burglarious tools, the possession by the defendant, at or about that time, of corresponding tools may be shown, because by such evidence it is shown that the defendant had the means to commit the offense in the mode in which it was committed and because the possession of the means by which the offense was actually committed is a circumstance which tends when other circumstances do not oppose but agree with it, to connect the accused with the commission of the offense. But if it appears from other evidence that the burglary was not committed by means of burglarious tools, as where the burglar has entered by an open door or window, the possession of burglarious tools cannot be shown; because, so far as the case shows, there is no connection, probable or possible, between it and an offense confessedly committed without the aid of such tools. (People v. Winters (1866) 29 Cal. 658, 659-660.)

Defendant asserts that none of the objects found on his person other than the socks were shown to have been connected with burglary, and that therefore their admission was improper under the principle last set forth in the above quotation. (See People v. Sansome (1890) 84 Cal. 449, 453-455.) He points to the fact that no marks were left on the doorways. This overlooks the testimony of

Officer Miller to the effect that the strips taken from the defendant were burglar tools used to slip a lock on a door; that they were adapted to and in fact could be used to open the door to the apartment building and the door to apartment number 002; and that they usually do not leave a mark. The testimony as to the experiments with the strips was properly admitted. (People v. Sturman (1942) 56 Cal. App. 2d 173, 181; People v. Savage (1936) 14 Cal. App. 2d 142, 144.) It is clear that the tools have a high probative value and are properly admissible where they are shown to have a physical connection with the means used to effect the entry. (People v. Likes (1955) 44 Cal. 2d 679, 683; People v. Godlewski (1943) 22 Cal. 2d 677, 685; People v. Hope (1882) 62 Cal. 291, 294-295; People v. Lindsay, supra, 227 Cal. App. 2d 482, 497; People v. Weems (1961) 196 Cal. App. 2d 405, 410; People v. Nichols (1961) 196 Cal. App. 2d 223, 227; People v. Cartier (1959) 170 Cal. App. 2d 613, 616.) The tools also are properly admitted if they are reasonably adapted to the performance of the entry which is in fact effected. (People v. Hope, supra, 62 Cal. 291, 294; People v. Clinton (1926) 78 Cal. App. 1, 454; People v. Trujillo, supra, 32 Cal. 2d 105, 116; and see People v. Lindsay, supra, 227 Cal. App. 2d 482, 499; People v. Peete (1921) 54 Cal. App. 333, 347-351.) There was no error in admitting the strips.

Some cloud is thrown on the admission of the other articles by the statement in Winters, supra, on which defendant relies. (See also People v. Sansome, supra, 84 Cal. 449, 453-455; People v. Nichols, supra, 196 Cal. App. 2d 223, 227-228; and People v. Miller (1957) 50 Cal. App. 2d 212, 213-214.) Defendant fails to consider the circumstances of this case. The articles were not secured in connection

with an arrest removed in time and distance from the offense, but one immediately connected with the alleged illegal act. Under such circumstances the possession of articles - sack, gloves, pen-lights, watch cap, and bolt cutters - reasonably adapted to use in connection with the commission of a burglary whether so used or not, are properly admissible as showing defendant's felonious intent. (People v. Gibson (1949) 94 Cal. App. 2d 468, 470, 471-472; People v. Sturman, supra, 96 Cal. App. 2d 173, 180-181; and see People v. Weems, supra, 197 Cal. App. 2d 405, 410.)

It is concluded that all of the articles offered by the prosecution were properly admissible into evidence.

III. The exhibition of the articles prior to their admission in evidence did not constitute prejudicial error.

Defendant asserts that the trial court erred in permitting the district attorney to keep several items of evidence on the counsel table in front of him and in full view of the jury prior to the introduction of any testimony regarding them, or their being marked for identification, or admitted into evidence. His failure to point out any transcript reference where allegedly erroneous rulings were made, renders it unnecessary to give this argument any consideration. (Cal. Rules of Court, rule 15(a); People v. Meyer (1963) 216 Cal. App. 2d 618, 635.)

It has been noted, however, that the defendant early in the trial, while the victim was identifying his socks, requested: "Will counsel be further directed not to place on counsel table such exhibits as he may have until or unless they have been produced into evidence?" The items in question were not identified except as "certain pieces of what appear ... to be material." Subsequently a similar ob-

jection went to the gloves, the black bag, some socks and a hat. The court indicated they should not be so exhibited if not relevant, but permitted the prosecutor to proceed as he deemed advisable in regard to relevant articles. A final objection was made to articles on the counsel table which were thereupon exhibited to Officer Hoover and identified by him as having been removed from the possession of the defendant.

The point involved is not a question of trial technique and order of proof. It involves balancing possible prejudice, in the event articles of a highly inflammatory or prejudicial nature, which are subsequently found inadmissible, are exhibited before the jury, with the necessity of proceeding with the trial in an orderly, efficient, and timely manner without unwarranted interruptions for the purpose of reviewing each item of evidence out of the presence of the jury. The exhibition of improper materials to the jury should not be condoned. (See *Page v. State* (1949) 208 Miss. 347, 361-363; 44 S. 2d 459, 465; and *Helton v. Mann* (1942) 111 Ind.App. 487, 500; 40 S. 2d 395, 400-401.) On the other hand insofar as the articles are admitted into evidence, no error can be shown and no possible prejudice can result. The exhibition of the bolt cutters, despite the fact that they were not admitted in evidence, cannot be the basis of error, because, as has been indicated, the trial court could have admitted them in evidence. (See *People v. Miller*, supra, 150 Cal. App. 2d 212, 214; and cf. *People v. Gibson*, supra; and *People v. Sturman*, supra.) Furthermore, the testimony that they were found on the defendant was never stricken from the record, and the error, if any, in exhibiting what was properly referred to verbally could not be prejudicial.

IV. There was no error in referring in argument to defendant's possession of the bolt cutters.

Defendant refers to numerous occasions on which the prosecutor in making his argument to the jury referred to the fact that defendant had the bolt cutters in his possession when apprehended. It is error, and may be prejudicial, to refer to an article as though it were utilized in the commission of an offense, if, despite a reference to it in the testimony, it was not admitted into evidence and not connected up with the crime in question. (People v. Evans (1952) 39 Cal. 2d 242, 246-247 and 251-252.) In the instant case, however, the article mentioned in the argument was in fact connected up with the defendant at about the time of the commission of the offense. For the reasons set forth above it was not error to admit testimony of this fact, and it was not error to refer to that testimony even though the article itself had been, albeit erroneously, excluded. (People v. Amaya (1901) 134 Cal. 531, 539; People v. Costa (1956) 145 Cal. App. 2d 445, 447.)

The appeal from the order denying the motion for new trial is dismissed, and the judgment (and the sentence as merged therein) is affirmed.

Sims, J.

WE CONCUR:

Sullivan, P. J.

Colinari, J.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBIT "B"

1 ORIGINAL FILED

2 DEC. 6, 1966

3 CLERK U.S. DIST. COURT
4 SAN FRANCISCO

5
6 UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA

8 GRANT WILSON, Jr.,

9 Petitioner,

10 -v-

11 FRANK MADIGAN,

12 Respondent.

13 THE PEOPLE OF THE STATE OF CALIFORNIA,

14 Real Party in Interest.
15

No. 44981

16 ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS,
17 VACATING ORDER RELEASING PETITIONER ON BAIL, AND
18 ORDERING PETITIONER'S RETURN TO THE CUSTODY OF RESPONDENT.

19 Petitioner stands convicted by the Superior Court of
20 the State of California, in and for the County of Alameda, of
21 first degree burglary, Cal. Pen. Code Sec. 459. He is currently
22 free on bail from state custody under the order of this Court
23 dated April 14, 1966, pending outcome of this habeas corpus
24 proceeding. Petitioner was sentenced to a term of from five
25 years to life. The execution of the sentence was suspended,
and he was placed on probation for a period of four years upon

-1-

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

1 terms and conditions which included serving a term of one year
2 in the county jail. Subsequent to his conviction, petitioner
3 served approximately two months in the county jail after which
4 the trial court set bail and released petitioner pending the
5 outcome of his appeal in the California District Court of
6 Appeal. The District Court of Appeal decided adversely to
7 petitioner on November 30, 1965, People v. Wilson, 238 Cal.App.
8 2d 447 (1965). Appeal to the California Supreme Court followed,
9 and on January 26, 1966, the Supreme Court of California denied
10 a petition for a hearing of his appeal. Thereafter, on March
11 29, 1966, execution of the remainder of the sentence was ordered
12 and petitioner was ordered back into respondent's custody.

13 The substance of petitioner's allegations is that he
14 was denied his federally protected constitutional rights
15 when the prosecution introduced evidence of his silence in
16 response to accusatory questions as an admission by silence.
17 In this contention petitioner is incorrect, because of the time
18 at which his case arose. Petitioner's trial commenced February
19 20, 1964. It is now clear that the silence of an individual
20 under police custodial interrogation cannot be used against
21
22
23
24
25

1 him in a criminal trial,^{1/} Miranda v. Arizona, 384 U.S. 436,
2 468 n. 37 (1966); however, the holding in Miranda is not
3 available to persons whose trials began before June 13, 1966,
4 Johnson v. New Jersey, 384 U.S. 719 (1966). Petitioner contends
5 that footnote 37 in the Miranda opinion which supports his
6 position should not be measured by the prospective application
7 ruling of Johnson, but by the rule of prospective application
8 for Griffin v. California, 380 U.S. 609 (1965), as stated in
9 Tehan v. Shott, 382 U.S. 406 (1966).^{2/}

11
12
13
14
15
16
17
18
19 ^{1/} In view of the disposition of the case, it is not neces-
20 sary to decide whether there was "custodial interrogation" in
21 this case, and the Court expresses no view as to whether peti-
tioner was in custody at the time the interrogation was con-
ducted.

22 ^{2/} The rule for prospective application of Griffin is differ-
23 ent from that applied to Miranda. The Griffin decision is
24 applicable to all cases not final as of the date Griffin was
decided. Tehan v. Shott, 382 U.S. 406 (1966). Miranda is
25 applied only to trials commencing as of the date of the deci-
sion or later. Johnson v. New Jersey, 384 U.S. 719 (1966).

1 The argument is novel and there is an analytical analogy be-
2 tween comment on the failure of a defendant to testify, which
3 is prohibited by Griffin, and an adoptive admission by silence
4 in this case. Nonetheless, the plain language of Miranda
5 indicates that petitioner's contention is not well taken.
6 The footnote in question provides:

7 Lord Devlin has commented:

8 "It is probable that even today, when there is
9 much less ignorance about these matters than
10 formerly, there is still a general belief that
11 you must answer all questions put to you by a
policeman, or at least that it will be the worse
for you if you do not." Devlin, The Criminal
Prosecution in England 32 (1958).

12 In accord with our decision today, it is im-
13 permissible to penalize an individual for exercising
14 his Fifth Amendment privilege when he is under
15 police custodial interrogation. The prosecution
16 may not, therefore, use at trial the fact that he
17 stood mute or claimed his privilege in the face of
18 accusation . Cf. Griffin v. California, 380 U.S.
609 (1965); Malloy v. Hogan, 378 U.S. 1, 8 (1964);
Comment, 31 U. Chi. L. Rev. 556 (1964); Develop-
ments in the Law - Confessions, 79 Harv. L. Rev.
935, 1041-1044 (1966). See also Bram v. United
States, 168 U.S. 532, 562 (1897). (Emphasis added.)

19 Miranda v. Arizona,
384 U.S. 436, 468 n.37 (1966)

20 It is apparent by a reference to the relevant text of the
21 opinion which disucsses the coercive evils of interroga-
22 tion of a suspect, including the dilemma posed by silence in
23 the face of accusations and also the precise language of the
24 footnote, that the footnote is considered a part of the
25 holding in Miranda. The reference to Griffin v. California,

supra, is merely by way of analogy and does not indicate that the prospectivity should be governed by the same rules applicable to Griffin.

Accordingly, this petition for writ of habeas corpus must be and hereby is DENIED, the order releasing petitioner on bail is vacated, and IT IS ORDERED that petitioner be returned to custody of respondent in accordance with his previous state sentence.^{3/}

Dated: December 6, 1966

/s/ ALFONSO J. ZIRPOLI
United States District Judge

^{3/} The Court notes that California law has been a bellwether in this particular area, as well as many other areas concerning the rights of the criminal defendant. In People v. Simmons, 28 Cal. 2d 699 (1946), it was held that there are very limited situations in which admissions by silence can be introduced as evidence of guilt in a criminal trial. Factors to be considered in making the determination included a consideration of whether the conduct of the accused merely indicates a desire to avail himself of the rule against self-incrimination or whether it could reasonably give rise to an inference of acquiescence or guilty conscience. When this test is applied to the facts of this case, it seems clear that the state itself conceded that petitioner was invoking his privilege against self-incrimination. The record is replete with comment by the prosecutor on the silence of the defendant. Two of the more startling examples of comment by the prosecutot are:

... "What is your name?" This is an innocent man, mind you, and he didn't know anything about the law; just a grand guy out there in the street.

... Trial Record p. 398 (emphasis added).

... That man knew in advance what to do - for example, not to talk to police officers.

Trial Record p. 423 (emphasis added).

(For conclusion of this footnote, see p. 6)

1 It is surprising to this Court that the state courts found
2 that the above comments did not violate the rule laid down in
3 the Simmons case; but the question is one of state law, not
4 federal law, since petitioner cannot come within the date for
5 prospective application of Miranda.
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBIT "C"

1 EDWARD L. CRAGEN
2 JOHN J. FAHEY
3 555 Polk Street, Suite 201
4 San Francisco, California 94102
5 Telephone: 776 8990

ORIGINAL FILED

DEC. 15, 1966

CLERK, U.S. DIST.
COURT, SAN FRANCISCO

Attorneys for Petitioner

6 IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
7 DISTRICT OF CALIFORNIA
8

9 GRANT WILSON, Jr.,

10 Petitioner,

11 -v-

12 FRANK MADIGAN,

13 Respondent.

14 THE PEOPLE OF THE STATE OF CALIFORNIA,

15 Real Party in Interest.

NO. 44981

CERTIFICATE OF
PROBABLE CAUSE
TO APPEAL

16
17 The Court having considered petitioner's application
18 for a Certificate of Probable Cause to Appeal; and, the Court
19 being unable to say that an appeal from its order denying said
20 application would be frivolous;

21
22 AND GOOD CAUSE APPEARING THEREFOR

23 THIS COURT CERTIFIES THAT THERE IS PROBABLE CAUSE TO
24 APPEAL ITS ORDER DENYING THE PETITION FOR THE WRIT OF HABEAS
25

1 CORPUS HEREIN DATED DECEMBER 6, 1966. (28 U.S.C. Sec. 2253).

2 DATED: December 14, 1966.

3
4
5
6 /s/ ALFONSO J. ZIRPOLI

7 JUDGE
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRANT WILSON, JR.,

Plaintiff and Appellant,

vs.

FRANK MADIGAN,

Respondent and Appellee,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

No. 21684

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

JEROME C. UTZ
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-3299

Attorneys for Respondent-Appellee

FILED

NOV 7 1967

WM. B. LUCK, CLERK

NOV 15 1967

TOPICAL INDEX

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
APPELLANT'S CONTENTIONS	9
SUMMARY OF APPELLEE'S ARGUMENT	10
ARGUMENT	
I. THE DISTRICT COURT PROPERLY DENIED THE WRIT BECAUSE OF THE TIME IN WHICH APPELLANT'S CASE AROSE	10
II. NOTHING IN <u>GRIFFIN</u> REQUIRES THE REJECTION OF THE <u>INFERENCE</u> TO BE DRAWN FROM APPELLANT'S NONASSERTIVE CONDUCT, OR FROM HIS SILENCE PRIOR TO THE ACCUSATORY STAGE, WHEN IT IS NOT RESTED ON CONSTITUTIONAL GROUNDS	15
III. EVEN IF THERE WAS ERROR THE HARMLESS ERROR RULE APPLIES	17
CONCLUSION	18

TABLE OF CASES

	<u>Page</u>
<u>Chapman v. California</u> 17 L.Ed.2d 705 (1967)	17
<u>Griffin v. California</u> 380 U.S. 609 (1965)	12
<u>Johnson v. New Jersey</u> 384 U.S. 719 (1966)	13
<u>Linkletter v. Walker</u> 381 U.S. 618 (1965)	14
<u>Malloy v. Hogan</u> 378 U.S. 1 (1964)	13
<u>Miranda v. Arizona</u> 384 U.S. 436 (1966)	12
<u>Tehan v. Shott</u> 382 U.S. 406 (1966)	13
<u>Wilson v. Anderson</u> 379 F.2d 330 (9th Cir. 1967)	18

CONSTITUTION

UNITED STATES CONSTITUTION	
Fifth Amendment	13

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRANT WILSON, JR.,)	
)	
Plaintiff and Appellant,)	No. 21684
)	
vs.)	
)	
FRANK MADIGAN,)	
)	
Respondent and Appellee,)	
)	
THE PEOPLE OF THE STATE OF CALIFORNIA,)	
)	
Real Party in Interest.)	

APPELLEE'S BRIEF

JURISDICTION

Plaintiff and appellant has invoked the jurisdiction of this Court under Title 28, sections 1291, 2241(a), 2241(c)(3) and 2253 which makes a final order in a federal habeas corpus case reviewable in a court of appeal when a certificate of probable cause is issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts

On March 17, 1964, appellant, Grant Wilson, Jr., was convicted in the Superior Court of Alameda County of violating California Penal Code section 459 (burglary). Appellant was sentenced to state prison

for the term prescribed by law; the execution of sentence was suspended for four years, and appellant was granted probation, one of the conditions of which was that he serve one year in the county jail in custody of respondent sheriff (TR 22, 23).^{1/}

Appellant appealed to the California Court of Appeal. On November 30, 1965, the Court of Appeal, First Appellate District, Division One, affirmed the judgment. People v. Wilson, 238 Cal.App.2d 447 (1965). A copy of the opinion of the Court of Appeal was appended to respondent's return. Appellant's application to the Supreme Court of California for a hearing of his appeal was denied on January 26, 1966 (TR 23).

B. Proceedings in the federal courts

Appellant filed a petition for writ of habeas corpus in the district court on April 5, 1966 (TR 1). On December 6, 1966, the petition was denied (TR 32). On December 15, 1966, Judge Zirpoli granted appellant's application for a certificate of probable cause and for leave to appeal (TR 38). On January 4, 1967, appellant filed a notice of appeal to this Court (TR 40).

/

/

1. "TR" refers to the Transcript of Record.

STATEMENT OF FACTS

The victim, a United States Treasury Agent, testified that he lived in an apartment building with approximately 20 units at 271 Vernon Street in Oakland.^{2/}

On Friday, September 13, 1963, at about 7:00 p.m., he left the apartment for the week end, turned off the lights, and locked the door. Early the following morning, at 3:30 a.m. on September 14, pursuant to directions received on the police radio, three officers converged on the premises. Officer Lusk, the first to arrive, talked to a man coming out of the driveway of the premises and went down the driveway into a garage area under the apartment building. He continued on through a door to the back of the building to another parking area under the apartment and checked the automobiles there. Officer Hoover, who pulled up as Lusk was getting out of his car, walked over and talked to the reporting party in the driveway with Lusk. While he was still there Officer Fiege arrived and joined the conversation. Hoover went down to check cars in the subterranean garage.

2. The facts in this case are taken from the opinion of the Court of Appeal, "Exhibit B."

Fiege went searching down through the garage and out the same door through which Lusk had exited toward the rear of the building. He descended some stairs which led to a back driveway leading to the car-ports under the apartment. Just before he entered the driveway he heard a commotion of feet moving in the driveway and around the side of the building. He stepped around the corner, showed his flashlight in the direction from which he had heard the noise, and saw the lower half of a man going in the doorway in the middle of the building. He shouted, "Come out of there," went to the doorway and observed two men going through a doorway at the top of some stairs at the end of a hall. He got to the top of the stairs in time to see the two men running down another hallway. He observed that they both had on dark clothes and that the rearmost of the two men had black gloves on and some kind of black cloth in his left rear pocket. The man in front seemed to have a suit coat on, and the other a knit type sweater. Fiege was running and shouting "Halt," but the men did not halt. They ran out of the building, turned right on Vernon Street, and turned off Vernon Street into a driveway.

Meanwhile Lusk, who was also in the rear of the building, had heard Fiege's shouts. He turned and

saw Fiege starting up the stairway. He ran over and saw Fiege at the first landing with someone running ahead of him. Lusk doubled back around the side of the building, and by the time he came to the street no one was there.

Hoover, who was just about to go through the door from the subterranean garage to the rear, heard the shouts and sounds of running to the rear of the building. He ran toward the street and as he came up the stairway saw "people" running south on Vernon with Officer Fiege running after them. He chased them down Vernon Street and saw one turn in the driveway.

Fiege, who was tired, gave up the chase at the point where Hoover overtook him, and returned to his patrol car. Hoover ran into the driveway and stopped momentarily in a parking area. He heard sounds to the south and to the west, and followed those which he believed to be the closer. Upon arriving at a stairway he saw a person descending and yelled, "Stop, police." The suspect turned north on reaching the street at the foot of the stairs, and Hoover, on arriving at the same street, observed him run northbound and turned to the left between two buildings. At this point Fiege drove by, conversed with Hoover and continued around the block. Hoover again saw the suspect as the latter emerged from between the two

buildings and started to run across a traffic island. When the officer again yelled, "Stop, or I will shoot," he stopped. Hoover held him, now identified as the appellant, at gun point. He was joined by Officer Dorsey who handcuffed appellant and in less than a minute Fiege came on the scene.

Both Fiege and Hoover noticed that appellant was out of breath and sweating profusely, and according to Hoover, he appeared to be frightened. He was attired in a white shirt, with a dark sweater which was tucked in at the collar, dark pants, dark shoes and no socks. He had black leather gloves on, and held a silver pen-light in his hand.

At the trial Hoover was asked to relate any conversation he had with appellant at this point. After objection was overruled the following transpired:

"Q. ... What did you say? A. I asked him what his name was. Q. What did he say? A. He didn't say anything. Q. Any other questions by you? A. I asked him where he was going in such a hurry. Q. What did he say, if anything? A. He didn't say anything."
(Exh. B, p. 5).

Hoover then searched appellant and found the following: Three pairs of socks - gray, black and

argyle - and a black silk sack in his left rear pants pocket; a second small pen-light in the sack; a black Navy watch cap in the right front pants pocket; a pair of bolt cutters with the handles cut off in his right rear pants pocket; and three plastic strips in his only shirt pocket. Appellant carried no wallet, credit cards or anything else indicating his identification. He had nothing else on his person other than a normal man's white handkerchief and money amounting to seven or eight dollars.

Fiege placed appellant in his patrol car and returned to park in front of 271 Vernon Street. Hoover retraced his steps in a vain search for anything that might possibly have been thrown away. Meanwhile Lusk had been looking around the apartment building and found the door of apartment 002 open two or three inches. The apartment was dark and no one responded when he rang the bell. He went out to the front to get another officer to enter the apartment with him.

Lusk met Hoover, who had returned to the apartment building, and they returned and entered apartment 002. They observed three jewelry boxes and the scattered contents thereof on the bed, and drawers of a dresser standing open.

At the trial Fiege was interrogated as to what transpired in the police car and, after appellant's objection was overruled, testified as follows:

"Q. All right, what did you say to the defendant; what was the conversation, Officer?

A. I asked the defendant his name. He did not answer. I asked him his address. He did not answer. I asked him who he had been with. He did not answer. I asked him if there was anybody in the area that I could contact to clear him, and he still did not answer."

(Exh. B, p. 6).

The witness continued:

"This took a few minutes. I was interrogating him and Officer Hoover came to the side of the car and said, "There was a burglary committed in that building."" (Exh. B, p. 6).

These remarks were stricken pending presentation of further foundation and argument which ended in the overruling of defendant's objection, and the examination continued as follows:

"Q. What did Officer Hoover say? A. Officer Hoover told me that there had been a burglary committed in 271 Vernon Street. Q. Did you

have further conversation with the defendant at that time? A. I did. Q. What did you say and what did he say? A. I told the defendant that there was a burglary in that building and he was under arrest for investigation of burglary, and I asked him if he had anything to say for himself. I repeated this twice. On the third time he said, his answer was, "Was there a burglary committed in that building?" (Exh. B, p. 7).

According to the officer the only other remark which was passed to or from the defendant was, in the witness' words:

"The only thing I did say was that we would have to book him without a name because he wouldn't give us his name or address or anything else." (Exh. B, p. 7).

APPELLANT'S CONTENTIONS

1. The United States District Court erred in holding that appellant was not entitled to the benefit of the rule of prespective application of Griffin v. California according to Tehan v. Shott. It further erred in holding that Johnson v. New Jersey controls the application of Miranda v. Arizona.

SUMMARY OF APPELLEE'S ARGUMENT

I. The district court properly denied the writ because of the time in which appellant's case arose.

II. Nothing in Griffin requires the rejection of the inference to be drawn from appellant's nonassertive conduct, or from his silence prior to the accusatory stage, when it is not rested on constitutional grounds.

III. Even if there was error the harmless error rule applies.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DENIED THE WRIT BECAUSE OF THE TIME IN WHICH APPELLANT'S CASE AROSE

The district court denied the petition for a writ of habeas corpus on the ground that appellant was not denied his federally protected constitutional rights because of the time at which his case arose (TR 33).

Judge Zirpoli stated:

"Petitioner's trial commenced February 20, 1964. It is now clear that the silence of an individual under police custodial interrogation cannot be used against him in a criminal trial, Miranda v. Arizona, 384 U.S. 436, 468 n. 37 (1966); however, the holding in Miranda

is not available to persons whose trials began before June 13, 1966, Johnson v. New Jersey, 384 U.S. 719 (1966). Petitioner contends that footnote 37 in the Miranda opinion which supports his position should not be measured by the prospective application ruling of Johnson, but by the rule of prospective application for Griffin v. California, 380 U.S. 609 (1965), as stated in Tehan v. Shott, 382 U.S. 406 (1966). . . . Nonetheless, the plain language of Miranda indicates that petitioner's contention is not well taken. . . .

. . . .

"It is apparent by a reference to the relevant text of the opinion which discusses the coercive evils of interrogation of a suspect, including the dilemma posed by silence in the face of accusations and also the precise language of the footnote that the footnote is considered a part of the holding in Miranda. The reference to Griffin v. California, supra, is merely by way of analogy and does not indicate that the prospectivity should be governed by the same rules applicable to Griffin.

"Accordingly, this petition for writ of habeas corpus must be and hereby is DENIED," (TR 33, 34, 35).

Appellant relies on footnote 37 in the Miranda opinion (34 U.S.L. Wk. at 4530), which states in part:

"In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1, 8 (1964); Comment, 31 U. Chi. L. Rev. 556 (1964); Developments in the Law - Confessions, 79 Harv. L. Rev. 935, 1041-1044 (1966). See also Bram v. United States, 168 U.S. 532, 562 (1897). (Emphasis added).

Petitioner contends that by virtue of the court's citation of Griffin v. California, supra, it intended that that part of its opinion in the Miranda case be afforded the same degree of retrospectivity as was afforded the rule in Griffin. See Tehan v. Shott,

382 U.S. 406 (1966). However, in Johnson v. New Jersey, the court expressly declared that: "Miranda applies only to cases in which the trial began after the date of our decision one week ago." (Emphasis added). 34 U.S.L. Wk. at 4593.

Appellant further asserts that the rules of Miranda v. Arizona, supra, and Johnson v. New Jersey, supra, have application to the case at bench only insofar as Miranda aids in the interpretation of Griffin v. California, supra. Appellant further argues that his case falls within the holding of Griffin.

Appellees submit that this case does not fall within the holding of Griffin and that the date of trial is controlling. This is supported by an analogy on the kindred decisions of Griffin and Tehan. In Griffin, the United States Supreme Court held for the first time that adverse comment by the court or the prosecution to the jury on an accused's silence during a state trial (not prior to trial) violates the proscription against self-incrimination included in the Fifth Amendment to the Federal Constitution. While this ruling was necessarily premised upon the prior ruling in Malloy v. Hogan, 378 U.S. 1 (1964), the court in Tehan ruled that Griffin did not apply to all cases tried subsequent to Malloy but

only to those not "finalized," in the sense of Linkletter v. Walker, 381 U.S. 618 (1965), as of the date the decision in Griffin was announced. Appellees submit that the relationship between Malloy and Miranda in the realm of "implied admissions" is closely analogous to the relationship between Malloy and Griffin in the realm of adverse comment on an accused's silence at trial. Just as the decisional seed which later bloomed in Griffin is impliedly imbedded in Malloy, so too is Miranda's clear proscription of "implied admission" evidence genealogically connected to Malloy. However, while the proscription against adverse comment on the accused's silence at trial was implicitly promulgated by Malloy, it was not explicated therein. This was left to Griffin. Likewise, while the proscription against evidentiary use of "implied admissions" was implicit in Malloy, it was Miranda that first spelled it out. Hence, it logically follows that the ruling banning the evidentiary use of "implied admissions" first explicated in Miranda, need only be applied to those cases wherein the trial occurred after the date of the Miranda decision as expressly stated in Johnson v. New Jersey, supra.

/

/

II

NOTHING IN GRIFFIN REQUIRES THE REJECTION OF THE INFERENCE TO BE DRAWN FROM APPELLANT'S NONASSERTIVE CONDUCT, OR FROM HIS SILENCE PRIOR TO THE ACCUSATORY STAGE, WHEN IT IS NOT RESTED ON CONSTITUTIONAL GROUNDS

The original questions propounded to appellant before the discovery of the burglary were not accusatory statements and there was no attempt to foist the declaration of others on the appellant as his own admissions.

The appellant's failure to respond to inquiries concerning his name, address, destination, companions, if any, and acquaintainship in the neighborhood is in no sense the adoptions of declarations of others. No declarations or statements of the appellant were involved, and his silence cannot be distinguished in this regard from his other nonassertive conduct in fleeing from the scene and twice previously refusing to obey the officer's command to halt which was evidence, in and of itself, from which the jury could infer guilty knowledge.

At the time the preliminary questions were asked, the officers did not know what crime, if any, had been committed. The questions were not designed to elicit incriminating statments, but to afford the defendant an opportunity to explain his presence and actions. The foregoing principle not only covers the evidence of

the original interrogation by both officers to which appellant failed to respond, but also the question after the burglary was discovered when appellant was asked if he had anything to say for himself and responded: "Was there a burglary committed in the building?" (RT 14, 15). As demonstrated hereinabove, the only "implied admissions" were directly attributable to appellant's nonassertive conduct in fleeing from the scene of the crime and failing to halt, not from failure to give his name and address or the final question he asked the police officers.

Even, arguendo, if the probative facts elicited be deemed extrajudicial statements, as distinguished from nonassertive conduct, they were admissible as admissions obtained before the authorities had commenced a process of interrogation that lent itself to eliciting incriminating statements. Absent therefore was one of the conditions deemed essential to render the statements inadmissible under the rules laid down in Escobedo, Dorado and Stewart. Since the Griffin rule on its face does not apply to commentary on appellant's conduct prior to trial, the considerations of reasonable investigation should control.

/

III

EVEN IF THERE WAS ERROR THE HARMLESS ERROR RULE APPLIES

Appellees submit that there was no reasonable possibility that the evidence complained of might have contributed to appellant's conviction. In Chapman v. California, 17 L.Ed.2d 705 (1967), the Supreme Court stated:

"[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the federal constitution, be deemed harmless, not resulting in the automatic reversal of the conviction."

Appellees submit that in the instant case when the record is reviewed in the light of Chapman that there is not the slightest doubt that, if error was committed, it did not contribute to appellant's conviction. The record discloses the following facts:

(1) Police officers observed appellant fleeing from the burglarized building.

(2) Appellant failed to obey the police officers command to "halt."

(3) Appellant finally stopped when the officer again yelled, "Stop, or I will shoot."

(4) Appellant was out of breath and sweating profusely when stopped, was wearing black leather gloves and held in his hand a silver penlight.

(5) Found in his possession were burglary tools and a pair of brown argyle socks. Three pairs of socks had been stolen from the burglarized apartment and one pair was brown argyle.

(6) Appellant's alibi was that he was out for a walk, found a black bag, was examining its contents, trying on the gloves and putting things in his pocket when he was seen by the arresting officers. He denied ever being in the burglarized apartment.

Under these circumstances, appellees submit that it is demonstrated beyond a reasonable doubt that the complained of evidence, even if inadmissible, did not contribute to appellant's conviction. See Wilson v. Anderson, 379 F.2d 330 (9th Cir. 1967).

CONCLUSION

Appellees submit that in the instant case there was no constitutional Griffin or Miranda error. The record clearly demonstrates that the police acted reasonably toward appellant and that if there was error the

harmless error rule should apply.

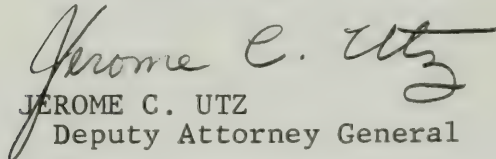
It would not be fair to the state nor to the public to vacate judgments such as this one on the basis of constitutional standards which are in flux and could not have been reasonably anticipated by the police at the time they acted. To hold otherwise would run counter to the Supreme Court's course in Johnson v. New Jersey, in which the desirability of finality in criminal judgments comporting with juxtaposed constitutional standards is recognized.

It is respectfully submitted that the order of the district court denying the petition for writ of habeas corpus should be affirmed.

Dated: November 6, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General


JEROME C. UTZ
Deputy Attorney General

Attorneys for Respondent-Appellee

JCU:pp
CR SF
66-534

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: November 6, 1967


JEROME C. UTZ
Deputy Attorney General

No. 21685 ✓

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LBERT F. MONSMA,

Appellant,

-vs-

ENTRAL MUTUAL INSURANCE COMPANY,

Appellee.

BRIEF OF APPELLANT

FILED

JUL 13 1957

WM. B. LUCK, CLERK

James K. Tallman
926 Third Avenue
Anchorage, Alaska
Attorney for Appellant

SUBJECT INDEX

	Page
JURISDICTION AND PLEADINGS.....	1
STATEMENT OF THE CASE.....	2
SPECIFICATION OF ERRORS.....	9
QUESTIONS PRESENTED FOR REVIEW.....	7
SUMMARY OF ARGUMENT.....	12
ARGUMENT.....	14
I. THAT THE COURT ERRED IN SUBMITTING TO THE JURY SUPPLEMENTAL INSTRUCTION NO. 1, AFTER THE JURY HAD RETIRED.....	14
II. THAT THE COURT ERRED IN SUBMITTING THE SECOND PAGE TO THE SPECIAL VERDICT INCLUDING AN INTERROGATORY CONCERNING "NOVATION".	23
III. THAT THE COURT ERRED IN SUBMITTING INTERROGATORY NO. 4 PERTAINING TO WAIVER OF METHODS OF CAN- CELATION FOR THE REASON THAT THERE WAS NO EVIDENCE OF SUCH WAIVER AND FURTHER THAT THE COURT ERRED IN SUBMITTING ANY INTERROGATORIES TO THE JURY.....	25
CONCLUSION.....	33

TABLE OF AUTHORITIES CITED

Cases:	Page
Evansville Container Corporation v. McDonald, 132 F.2d 80.....	17
Hartsfield v. Carolina Casualty Insurance Co., 411 P.2d, 396 (Alaska, 1966).....	21
Keeling v. Travelers Ins. Co. Hartford, Conn., 67 P.2d 944 (Oklahoma, 1937).....	20
Kingsbury Breweries Company v. Schechter, 142 F.Supp. 219.....	15
Likins-Foster Monterey Corp. v. U.S., 308 F.2d 595...	15
Ostapenko v. American Bridge Division of U. S. Steel Corp., 267 F.2d 204.....	15
Pacific States Corporation v. Hall, 166 F.2d 668, (CA 9, 1948).....	30
Terminal R. Association of St. Louis v. Staengel, 122 F.2d 271.....	17
United States v. Chichester, 312 F.2d, 275 (CA 9, 1963).....	30
Ward v. Cochran, 150 U.S. 597; 37 L.Ed. 1195.....	24
Wilson v. Southern Farm Bureau Cas. Co., 275 F.2d 819.....	15
 <u>RULES:</u>	
Federal Rules of Civil Procedure, Rule 8.....	28
Federal Rules of Civil Procedure, Rule 51.....	15
 <u>OTHER AUTHORITIES:</u>	
Federal Practice and Procedure, Barron and Holtzhoff, Section 1101, page 439.....	16

OTHER AUTHORITIES (cont'd)

Page

90 American Law Reports, Annotated, 2d Series, page 1041.....	32
28 American Jurisprudence, 2d Edition, Estoppel and Waiver, page 839.....	28
Wigmore on Evidence, 3rd Edition, Section 2510(b).	21

JURISDICTION AND PLEADINGS

A. Jurisdiction

Jurisdiction of the United States District Court for the District of Alaska was invoked under Title 28 USCA, Sec. 1447(b). The jurisdiction of the Court of Appeals rests on Section 1291 of the Federal Judicial Code, Title 28, USCA, and Rule 73, Federal Rules of Civil Procedure.

B. Pleadings

Appellant's Complaint was filed on June 21, 1965, in the Superior Court for the State of Alaska, Third Judicial District, based upon a claim against insurance company, defendants for a claimed fire loss. The case was removed on the basis of diversity of citizenship on July 19, 1965, to the District Court for the District of Alaska.

An Amended Complaint was filed on October 22, 1965, and the answer of the appellee herein to the Amended Complaint was filed on July 24, 1966.

A Stipulation for Dismissal without Prejudice and a Judgment of Partial Dismissal was entered on August 2, 1966, which dismissed the action as to all parties except the appellant and the appellee herein.

A formal judgment was entered on September 22, 1966, and a motion for new trial was filed on September 27, 1966.

The motion for new trial was denied by Minute Order dated November 18, 1966, and the Notice of Appeal was dated December 14, 1966, within the thirty day period allowed.

STATEMENT OF THE CASE

On August 24, 1964, Central Mutual Insurance Company, appellee herein, issued a fire insurance policy in the amount of \$25,000.00, on property located at 2200 C Street, Anchorage, Alaska (Tr. 260). The policy was originally issued in the name of Mrs. Albert Monsma (Tr. 238). Because of a pending divorce between the Monsmas, the property involved in this matter was quitclaimed to the appellant, Albert Monsma, on September 25, 1964, and the information was given to the insurance company agent who handled the insurance (Tr. 265,281).

It was admitted by the appellee that the insurance policy was assigned to appellant by his wife on October 19, 1964 (Tr. 241). Appellant claims that he paid for the insurance (Tr. 112) and one of the appellant's exhibits carried a notation indicating that \$75.00 of a check in the amount of \$95.00 was for the house insurance (Plaintiff's Exhibit M, Tr. 209).

The appellee contends that the policy of insurance was cancelled under the date of January 4, 1965, and that notice of cancellation was mailed to interested parties on December 23, 1964. The appellee also offered copies of the notice of cancellation which bore the name of appellant, Albert F. Monsma, and not the name of his wife. Marian Monsma stated that she received a notice of cancellation addressed to appellant which had been forwarded to her at

13431 Brookgreen Drive, Dallas, Texas (Tr. 273, 276). She further stated that she returned the notice of cancellation to the appellee (Tr. 276, 277). There was no showing that a subsequent notice of cancellation was sent to appellant.

The appellant after taking over the interest of his wife (Tr. 34, 262), became the sole contract purchaser of the property from contract sellers, Bailey E. Bell and Virginia Reis. The contract was escrowed at a bank in Anchorage, Alaska, (Tr. 198).

In January, 1965, one of the contract sellers, Bailey E. Bell, determined through the bank escrow that an attempt was being made to cancel the policy (Tr. 202). As a result, this seller obtained a \$15,000.00 policy with other companies to protect his own interest (Tr. 202). The policy so obtained was with Glens Falls Insurance Company and Kansas City Fire and Marine Insurance Company.

On January 16, 1965, a fire loss occurred at appellant's premises, and attempts were made to collect the insurance from the various insurance companies.

Suit was then filed in the name of appellant and the two contract sellers against the appellee and the other two insurance companies.

Before trial, the claim against the Glens Falls Insurance Company and Kansas City Fire and Marine Insurance Company was settled for \$12,500.00 (Tr. 60), which sum was received by the two contract sellers. The net effect of the

settlement was to leave appellant, Albert F. Monsma, as the sole remaining plaintiff and Central Mutual Insurance Company as the sole remaining defendant.

The appellant has maintained throughout that he has never received a notice of cancellation nor any refund of the prepaid premium (Tr. 36,38,130, 361), however, the unearned premium was mailed to Marian Monsma by a check in the amount of \$32.70, under date of February 11, 1965, after the fire loss (Tr. 254).

Prior to argument to the jury, appellee moved the court for a directed verdict on the grounds that no insurance contract had been entered into between Central Mutual Insurance Company and Albert Monsma, which motion was denied by the court (Tr. 371).

After argument, extensive objections to instructions were noted. After the jury had retired to deliberate, counsel for the appellee urged the giving of an instruction on presumption (Tr. 379). The appellant objected strenuously to the giving of such a supplemental instruction, but despite the objection, Supplemental Instruction No. 1 was given by handing it to the jurors. This instruction reads:

"You are instructed that where a letter is properly addressed, is properly stamped with sufficient postage thereon, and is deposited in a United States Post Office, a presumption arises that the letter reached the address to which it was addressed.

The court inadvertently neglected to include this instruction in the instructions previously

given you. You are admonished and instructed that you are not for any reason to place undue emphasis on this particular instruction.

You are again instructed that all of the instructions should be considered together as a connected series and regarded as the law applicable to this case. The jury has no right to disregard, or to give special attention to any one of the instructions, or to question the wisdom of any rule of law."

The record will show that the Special Verdict which was originally given to the jury contained an erroneous interrogatory on page 2, which reads:

"Interrogatory No. 3. Did the plaintiff, prior to the fire, enter into a novation with the defendant insurance company as defined in the instructions?

Answer to
Interrogatory No. 3.

(Yes or No) "

This was subsequently withdrawn and a corrected page 2 substituted, which reads:

"Interrogatory No. 3. Did the defendant insurance company, through its agent, cancel the insurance policy?

Answer to
Interrogatory No. 3.

(Yes or No) "

The appellant objected to the corrected Interrogatory on the ground that there was no evidence of any waiver of method of cancellation (Tr. 379). Further, appellant claimed that Interrogatory No. 4, which dealt with defects in the method of cancellation was entirely in conflict with Interrogatory No. 3, since if there had been a valid cancellation, there

would be no defects in it.

On September 9, 1966, the jury returned a verdict for the appellee; however they had not answered the Special Verdict Interrogatories (Suppl. Tr. 2), and were sent back for further deliberation. Prior to their retiring for further deliberation, the jury foreman questioned the court as to the meaning of the word "novation" (Suppl. Tr. 3). The court then indicated to the jury that through error, the second page of the jury's copy of the Special Verdict Interrogatories had not been changed, and that there were four interrogatories instead of five as previously given. The court then instructed the jury that the question of novation had been removed from the issue and it was to be disregarded (Suppl. Tr. 4). The jury then returned the Special Verdict in favor of the appellee (Suppl. Tr. 5).

After the jury was excused, appellant moved for a mistrial on the grounds that the jury had been unduly confused by the interrogatories that had been furnished them and by the belated offering of an instruction that had been filed late, which motion the court took under consideration on September 9, 1966 (Suppl. Tr. 6 & 7). The court deliberated until September 22, 1966, when a mistrial was denied and judgment entered for the appellee.

On September 27, 1966, appellant moved that the verdict of the jury be set aside, and that the judgment entered on the verdict be vacated and set aside and that a new trial be

granted, which motion was denied on November 18, 1966.

On December 12, 1966, appellant filed a Notice of Appeal from the Final Judgment, and from the Denial of Plaintiff's Motion to Grant a New Trial.

QUESTIONS PRESENTED FOR REVIEW

1. Should an instruction, offered late and belated drafted and given to the jury after argument and after the jury had retired, and particularly where the said instruction erroneously states the law of presumption pertaining to mailing, which matter is of crucial importance to the case herein, be permitted to stand?
2. Was the inadvertent giving of an interrogatory to the jury for the entire period of their deliberations, concerning an issue of novation which was not in the case, but which interrogatory was withdrawn after the jury had returned a verdict, sufficiently prejudicial to warrant a new trial?
3. Was the giving of an interrogatory on waiver of notice of cancellation prejudicially erroneous where there was a lack of the essential elements of waiver, and particularly where the jury found that such waiver had resulted?
4. Was the giving of interrogatories proper which resulted in inconsistent answers by the jury with the apparent result of confusing and misleading the jury?

All of the foregoing questions presented for review were raised in the proceedings following argument and after the jury had retired during the period of time that the court was taking exceptions to the proposed instructions.

SPECIFICATION OF ERRORS

I.

That the Court erred in submitting to the jury Supplemental Instruction No. 1, after the jury had retired, since the instruction unduly emphasized the question of mailing. The instruction reads:

"You are instructed that where a letter is properly addressed, is properly stamped with sufficient postage thereon, and is deposited in a United States Post Office, a presumption arises that the letter reached the address to which it was addressed.

The court inadvertently neglected to include this instruction in the instructions previously given you. You are admonished and instructed that you are not for any reason to place undue emphasis on this particular instruction.

You are again instructed that all of the instructions should be considered together as a connected series and regarded as the law applicable to this case. The jury has no right to disregard, or to give special attention to any one of the instructions, or to question the wisdom of any rule of law."

Objections were taken at the time of the trial to the giving of this instruction as follows:

"MR. TALLMAN: I object to the giving of this instruction at this time for the reason it does place undue emphasis on this particular instruction, and I feel it was incumbent upon the defendant to have brought this to the attention of the court at the time of the reading of the previous instructions or at the time the previous instructions were noted by Your Honor or your Honor indicated what instructions you were giving. I feel that by the defendant waiting to raise this at this time after the instructions have been given is an attempt to

place this undue emphasis on the one instruction and to the detriment of the plaintiff. I think it is also objectionable since it was belatedly brought to the attention of the court, although I know Your Honor said you were not going to hold counsel to time limits. However Your Honor had made a previous ruling that there were time limits on instructions."

II.

That the Court erred in submitting the second page to the Special Verdict including the Interrogatory designated No. 3:

"Interrogatory No. 3. Did the plaintiff, prior to the fire, enter into a novation with the defendant insurance company as defined in the instruction?

Answer to
Interrogatory No. 3.

(Yes or No)"

III.

That the Court erred in submitting Interrogatory No. 4.

"Interrogatory No. 4. Did the defendant insurance company, through its agent, cancel the insurance policy?

Answer to
Interrogatory No. 4.

Yes
(Yes or No)"

That objections to the giving of this interrogatory were as follows:

"MR. TALLMAN: I would object to the special verdict in whole because I don't feel that there has been a showing as to why we should have this, and in particular I would object on the ground that no. 4 pertains to methods of cancellation or if there are any defects in the method of cancellation did plaintiff waive such defects on the ground that there is no evidence of any waiver of method of

cancellation."

IV.

That the Court erred in submitting interrogatories to the jury since the interrogatories were misleading, confusing and ambiguous.

SUMMARY OF ARGUMENT

The court erred in submitting to the jury Supplemental Instruction No. 1 after argument and after the jury had retired. This instruction emphasized the presumption of the receipt of mail.

The offer presented by the appellee, upon which the court based its own instruction, was offered late in the proceedings and consideration of this matter was not brought to the attention of the court and appellant until after argument and after the jury had retired. Appellant strenuously objected because of the undue emphasis and the lateness of giving it, but the court gave the instruction, which in itself was an erroneous statement of the law because the evidence in the case at Bar had rebutted any presumption that would normally exist.

The court further erred in inadvertently submitting to the jury an interrogatory concerning the issue of novation. This interrogatory was with the jury until they had returned their verdict on the following day, although none of the interrogatories were answered at that time. The interrogatories were changed and the jury was sent back out, but the verdict had already been determined by the jury and the interrogatories were then answered. Appellant contends that the inadvertent interrogatory misled the jury.

Appellant further contends that the court erred in submitting interrogatories to the jury and in particular

Interrogatory No. 4 pertaining to waiver of methods of cancellation. One of the objections to Interrogatory No. 4 is that it was answered in an inconsistent manner to Interrogatory No. 3 and appellant objected to Interrogatory No. 4 upon the ground that there was no evidence of waiver of method of cancellation.

As noted above, appellant objected to any interrogatories since there was no showing by the court or appellee as to why any interrogatory should have been given that would unnecessarily emphasize some of the issues for no particular reason. In this regard it should be pointed out that the interrogatories were not for the purpose of enabling the court to reach a conclusion and served no purpose except to emphasize issues in favor of the appellee and against the appellant.

ARGUMENT

I.

THAT THE COURT ERRED IN SUBMITTING TO THE
JURY SUPPLEMENTAL INSTRUCTION NO. 1, AFTER
THE JURY HAD RETIRED.

It is appellant's contention that the jury was unduly influenced by the belated receipt of Supplemental Instruction No. 1, which emphasized the presumption of the receipt of the notice of cancellation by Appellant. It can be noted that appellee had ample time in which to submit the objectionable Supplemental Instruction No. 1 prior to the Court's giving the instructions to the jury, well knowing that the question of the mailing and receipt of the notice of cancellation was an integral part of his defense (Tr. 379-380). Even the answer alleges cancellation, so notice should be part of this proof. Therefore, by waiting until the jury had retired to deliberate, unreasonable emphasis of the presumption of receipt of the notice of cancellation resulted, and in the light of the subsequent verdict, the factor which apparently impressed them most.

The Court itself had reservations about the giving of the instruction (Tr. 379, 382), because of the undue emphasis the jury might place on it, even though this court were to give a cautionary instruction along with it to the effect that they should not give that particular instruction any more weight than any of the other instructions.

This instruction was not only untimely offered and

given after the jury had retired, but it is also erroneous as a matter of law. Because of the belated consideration of the instruction, this exception was only indirectly noted at the time of trial, by noting the emphasis on the presumption. However, it was pointed out to the court in appellant's motion for new trial. (R. 409-410)

Most federal cases in this area deal with the refusal of the District Court to give untimely offered instructions, e.g.:

Likins-Foster Monterey Corp. vs. U.S., 308 F.2d, 595;
Wilson vs. Southern Farm Bureau Cas. Co., 275 F.2d, 819;
Ostapenko vs. American Bridge Division of U.S. Steel Corp., 267 F.2d, 204

But for a clear statement of one court's interpretation under Rule 51, when instructions are to be offered see Kingsbury Breweries Company v. Schechter, 142 F. Supp., 219. The judge in this case stated at page 225:

"Requests to charge the jury, when submitted, should be ready for trial purposes at the time the parties rest...The Court took the time to read, discuss and rule upon the requests, saying: 'Where these requests are not in the hands of the Court prior to this time, we are not supposed to consider them at all.***I will have to study these while you are arguing' to the jury."

Rule 51 of the Federal Rules of Civil Procedure appears to be quite plainly worded and clear in its intent:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as

set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

In the case at Bar, it was obviously impossible for the court to "inform counsel of its proposed action upon requests prior to their arguments to the jury,..." for the simple reason that the instruction was not prepared until after argument to the jury, and, for that matter, not even drafted until after the jury had retired.

There is some authority that the court must inform counsel of its action upon requested instructions before argument. This appears to be a reasonable and practical rule enabling counsel to adequately prepare his argument. In this regard see Vol. 2B, Federal Practice and Procedure, Barron and Holtzoff, Section 1101, page 439:

"§1101. IN GENERAL

Under Rule 51 counsel, before argument to the jury, may submit written requests for instructions at the close of the evidence, unless the court reasonably requires the requests to be submitted earlier. Before the argument the court must inform counsel of its action upon the requests. The court's charge follows the argument. The purpose of Rule 51 is to enable counsel to know which requests will be granted or denied in order to argue the facts in the light of the

law as the court will charge the jury. Counsel must take the initiative. He must submit written requests or make specific objections. Otherwise he will have acquiesced and, by consent to the ruling, will have waived objection..."

For a case authority supporting the above text see Evansville Container Corporation v. McDonald, 132 F.2d, 80. The court specifically noted the purpose of Rule 51 at page 84:

"Rule 51, Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, authorizes the trial court to receive and rule on written requests for charges to the jury at any time during the trial or as the court reasonably directs and the rule further provides that 'the court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury' and according to the terms of the rule 'no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections.'"

Also in accord:

Terminal R. Association of St. Louis v. Staengel
122 F.2d 271

In the case at Bar, there is considerable evidence that appellant did not, in fact, receive the notice of cancellation. The witness, Marion M. (Monsma) Cox, stated that she received a notice of cancellation addressed to appellant at her residence in Dallas, Texas (Tr. 272 and 273). She further testified (Tr. 275, 276, 277 and 280) that she believes she put scotch tape on the opened letter and returned it to the sender, Ken C. Johnson Agency. She testified that her usual

procedure in handling any correspondence received by her for appellant was to reseal it and return it to the sender (Tr.276) or to simply return it to the sender (Tr. 288). Appellant also categorically states that no notice was received by him. (Tr. 36,38) In view of this evidence, Supplemental Instruction No. 1 incorrectly states the law.

The jury in this case must have based their decision upon Supplemental Instruction No. 1, since the jury found against the plaintiff, and by interrogatories found that the insurance policy had been cancelled. Since the only evidence concerning "receipt" was that the plaintiff had not received a notice of cancellation, the jury would have to have been swayed by the presumption. In view of the evidence that was given, the presumption prevailed.

Appellant urges the court to consider the plain error of the instruction itself, since the instruction does not properly state the law. Appellant's counsel is aware of prior rulings of this Circuit covering the question of exception to instructions. However, this case is distinguishable from prior cases in that the instruction was so untimely offered and belatedly given that appellant's counsel had only a matter of seconds or at most a few minutes before stating his objections to the instruction.

Up until the time of the giving of Supplemental Instruction No. 1, counsel had not been advised concerning this particular instruction. The only statement that the

Court had made prior to advising counsel that it intended to give it was as follows:

"THE COURT: Well, I actually intended to give it. I don't know what to do now. If I were to call the jury back, prepare an instruction, call the jury back and read it to them there might be a tendency that they would place undue emphasis on it." (Tr. 379)

Thenshortly after this the court decided to give the instruction and then requested objections as indicated by the following:

"THE COURT: I have prepared a supplemental instruction No. 1, which is predicated upon defendant's requested instruction No. 27, and I think it is warranted by the certificate of mail which is appended or is a part of the notice of cancellation, where Mrs. Kirkpatrick signed the certificate of mailing, and I intend to give this instruction, to the jury. It is my suggestion that I merely hand it to the bailiff to hand to the jury, but if the plaintiff requests I will have the entire jury returned to the courtroom and read it to them and then hand it to the foreman. What is your pleasure, Mr. Tallman?

MR. TALLMAN: I think handing it to the jurors is all right, but I do have strenuous objections, Your Honor, and would like to have them noted.

THE COURT: You may state your objections at this time, Mr. Tallman." (Tr. 380)

The offensive instruction was so untimely offered that even the counsel for appellee had apparently not checked the law on this particular point as indicated by the following shortly before the court decided to give the instruction:

"THE COURT:

I believe that's the extent of our objections.

Your objections to the form of special verdict both general and specific are noted.

Instruction No. 27, Mr. Delaney, I asked in my order that any special instruction requests be supported by authorities. I assume this is the law, do you have any authorities supporting it?

MR. DELANEY: I don't have at the present time, Your Honor. I understand that this is evidentiary presumption, in the absence of evidence to the contrary there is a presumption that mails reach the address to which they are addressed."(Tr. 379)

Since counsel for appellee, who proposed the instruction, had not been able to present the law on the presumption involved herein, it can hardly be argued that appellant's counsel could present such law in the brief time allowed. The proper rule of law is that when it is shown that a letter was prepared for mailing, was stamped and put into the mail, the presumption of its receipt is rebuttable, and is properly a question for the jury to decide.

The rule is clearly stated in Keeling v. Travelers Ins. Co., Hartford, Conn., 67 P.2d, 944 (Oklahoma, 1937) by the court syllabus:

"1. When a party introduces proof that a letter, duly addressed to a person, is deposited in the United States mail and has thereon sufficient postage to insure its carriage, a presumption of fact arises that the addressee received the letter, and this presumption is rebuttable; and when the addressee introduces

proof he did not receive the letter, a presumption of fact arises that the letter was not mailed, and the issue of whether such letter was mailed is for the jury."
(Emphasis added)

Alaska's Supreme Court has also adopted this rule in Hartsfield v. Carolina Casualty Insurance Co., 411 P.2d, 396 (Alaska, 1966), at page 400:

"[5] We adopt the view of those courts which hold that the denial of receipt rebuts a prima facie case of mailing and creates an issue of fact for resolution by the trier of fact."

For Text authority, see:

"IX, Wigmore on Evidence, 3rd Edition, §2519(B):

(B) In cases involving the application of this presumption, based on due mailing in the Government postal machinery, it becomes necessary to distinguish two issues raising different problems as to the sufficiency of evidence, viz. (a) cases where the issue under the pleadings is whether the letter was received; (b) cases where the issue under the pleading is whether the letter was mailed. (In both issues, we are to have in mind that the procedural effect of a presumption is to require (or justify) the conclusion unless some sufficient evidence to the contrary is introduced (ante, §2491), in which case the issue is before the jury merely on the relative strength of the conflicting evidence).

(a) Where the issue is whether the letter was received by the addressee, it often occurs that the addressee's testimony denies the arrival and receipt. This being some evidence to the negative of the issue, the binding effect of the presumption ends, and the issue goes to the jury to decide upon the weight of the evidence. On this point a Court is occasionally found holding that the uncontradicted testimony of the addressee denying the receipt 'entirely negatives the presumption,' and that therefore the jury cannot

find for the receipt; which is, of course, unsound because the jury may not believe the denial, as other Courts have pointed out.

(b) Whether the letter was mailed, becomes often the issue under the substantive law; for example, in charging an indorser of a negotiable instrument with a notice of the notarial protest, or in charging an insured with notice of a premium due; here the actual receipt of the letter becomes immaterial; the mailing suffices. But suppose that the addressee testifies in denial of the receipt? If this denial be believed, then is not the non-arrival of the letter some evidence that it was never mailed? The presumption above rests upon the supposed uniform efficiency of the postal service in delivering letters duly stamped, addressed, and mailed into its custody; if therefore the efficiency is operating, does not the non-arrival of an alleged letter indicate that such a letter was never given into the postal custody? Add to this, that the testimony to mailing comes usually from the mouth of persons who are vitally interested in proving the fact of mailing, e.g. a bank cashier who as notary mails notices of protest of the bank's negotiable instruments, or the agent of an insurer seeking to avoid a liability under the policy?

If therefore the addressee's testimony (also an interested witness) be believed, the non-arrival of such a letter is some evidence that no such letter was mailed; in short, it becomes essentially a question which testimony the jury will believe; therefore the case may go to the jury on that issue. This is the correct view, accepted by many Courts; some of them, however, limit such a ruling to cases where the testimony to mailing comes from an interested witness; some of them ask for something circumstantial in addition to the addressee's mere denial." (Emphasis supplied)

The instruction should not have been given.

II.

THAT THE COURT ERRED IN SUBMITTING THE
SECOND PAGE TO THE SPECIAL VERDICT
INCLUDING AN INTERROGATORY CONCERNING
"NOVATION"

On September 9th, the day following the submission of the case to the jury, the jury brought in a verdict for the defendant. However, the jury had not answered the interrogatories, and they were sent out to deliberate further. (Supplemental Transcript page 2). Then the jury returned to the courtroom again for further instructions on the interrogatories because one of the interrogatories concerned the question of novation as the result of the submission of an incorrect page of the Special Verdict.

The submission of incorrect page 2 of the Special Verdict, containing the question concerning novation, resulted in introducing an element to the jury which was not at issue in the case at Bar, thereby confusing them as to the facts actually at issue.

In addition to this, Instruction No. 42, which explains the interrogatories of the Special Verdict, contains references to only four interrogatories, (R.394) whereas, the incorrect page 2 contained five interrogatories. (R.396) This, in itself, is sufficient to confuse the jury as to the issues on which they must decide. Subsequently, the jury was furnished with the corrected page 2, deleting the issue of novation. However, this does not alter the fact that from the

outset of their deliberations, until they reached a verdict, this issue was erroneously before them.

The fact that the extraneous issue was impressed upon their minds is evidenced by the question addressed to the Court by the jury foreman:

"JURY FOREMAN: May I ask a question?

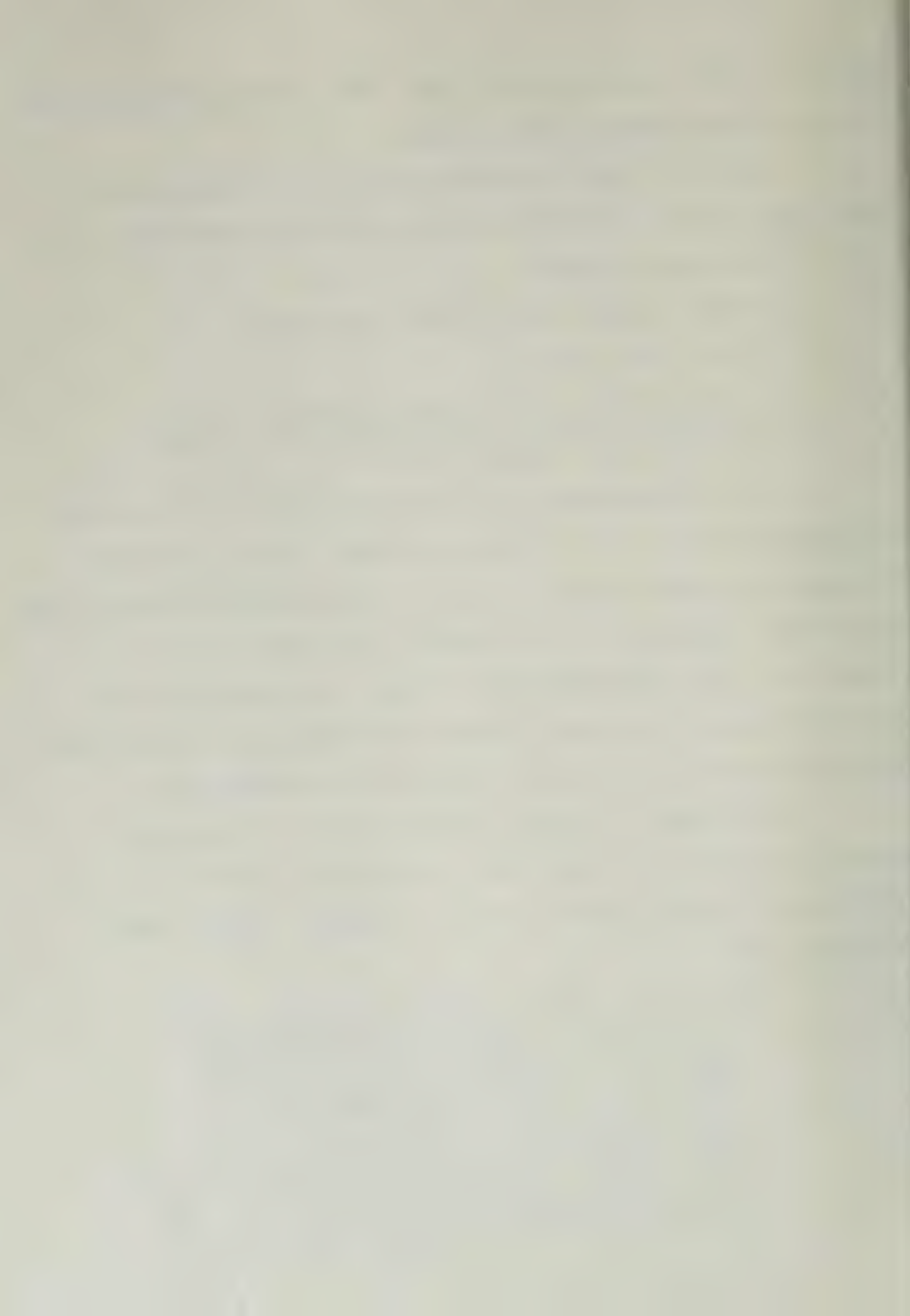
THE COURT: Yes.

JURY FOREMAN: On the word "novation" in one question, does that mean to approach or make a beginning?" (Suppl. Tr. 3)

Notwithstanding the Court's instruction to the jury to disregard the issue of novation (Suppl. Tr. 4), both the erroneous introduction of the issue, unintentional though it may have been, compounded by the Court's explanation as to the reason for its being introduced, served to impress the issue upon the minds of the jury. These circumstances unquestionably led to confusion of the jury during their deliberations.

In Ward v. Cochran, 150 U.S. 597; 37 L.Ed. 1195, where the trial court added oral instructions additional to the instruction formally given, the U. S. Supreme Court stated at page 1199:

"Nor do we think that this is one of those cases in which erroneous or insufficient instructions in one part of a charge are corrected or supplied by unobjectionable instructions, on the same questions, appearing in another part. It is evident that the attention of the jury must have been withdrawn from the instructions formally given, as requested, to those announced by the judge, as given on his own motion, and it seems evident that this



action of the court misguided the jury, and led them to overlook essential questions involved in the issue they were trying."

In the instant case, although this was not an instruction given by the Court on its own motion, we have a parallel situation. The attention of the jury was focused on the withdrawn issue, thereby causing them in their deliberations to place less emphasis than they normally would have on the actual issues in question.

III.

THAT THE COURT ERRED IN SUBMITTING
INTERROGATORY NO. 4 PERTAINING TO WAIVER
OF METHODS OF CANCELATION FOR THE REASON
THAT THERE WAS NO EVIDENCE OF SUCH WAIVER
AND FURTHER THAT THE COURT ERRED IN SUB-
MITTING ANY INTERROGATORIES TO THE JURY.
(Spec. of Errors Numbers 3 and 4)

A. INTERROGATORY NO. 4.

The appellant objected to the giving of interrogatories in this matter on the ground that there was no showing as to why we should have such interrogatories and further the appellant objected to Interrogatory No. 4 on the ground that there was no evidence of any waiver of method of cancellation.

The first two interrogatories were answered by the jury as "not applicable" and since they found for the defendant, this answer would be sufficient, since both pertain to items of damages. However, Interrogatories Nos. 3 and 4

are the objectionable ones and they are quoted herewith with the answers:

"Interrogatory No. 3. Did the defendant insurance company, through its agent, cancel the insurance policy?"

Answer to
Interrogatory No. 3.

Yes
(Yes or No)

Interrogatory No. 4. If there were any defects in the method of cancellation, did the plaintiff waive such defects?"

Answer to
Interrogatory No. 4

Yes
(Yes or No)"

/s/ (Dietrich Rempel, Foreman) (R. 394)

The appellant had objected to the giving of any interrogatories (Tr. 378-379) and in particular objected to the giving of Interrogatory No. 4 upon the ground that there was no evidence of waiver of method of cancellation. It should also be noted that Instruction No. 15 pertains to defects in the cancellation of an insurance policy being waived, and this was objected to by the appellant as follows:

"MR. TALLMAN: I object to No. 15 on the ground that there is no waiver of policy requirements of notice, there is no evidence of the waiver of policy requirements of notice on the part of plaintiff, and I further object to the instruction on the ground that I feel it is a misstatement of the law that the acquiescence of the insure in purchase of another insurance policy to replace the cancelled policy would be a waiver. I don't think that's the law and I think it's erroneous and object to that, and I also object on the ground that the insured making a claim against a subsequent insurance company would constitute a waiver."Tr.376-377)

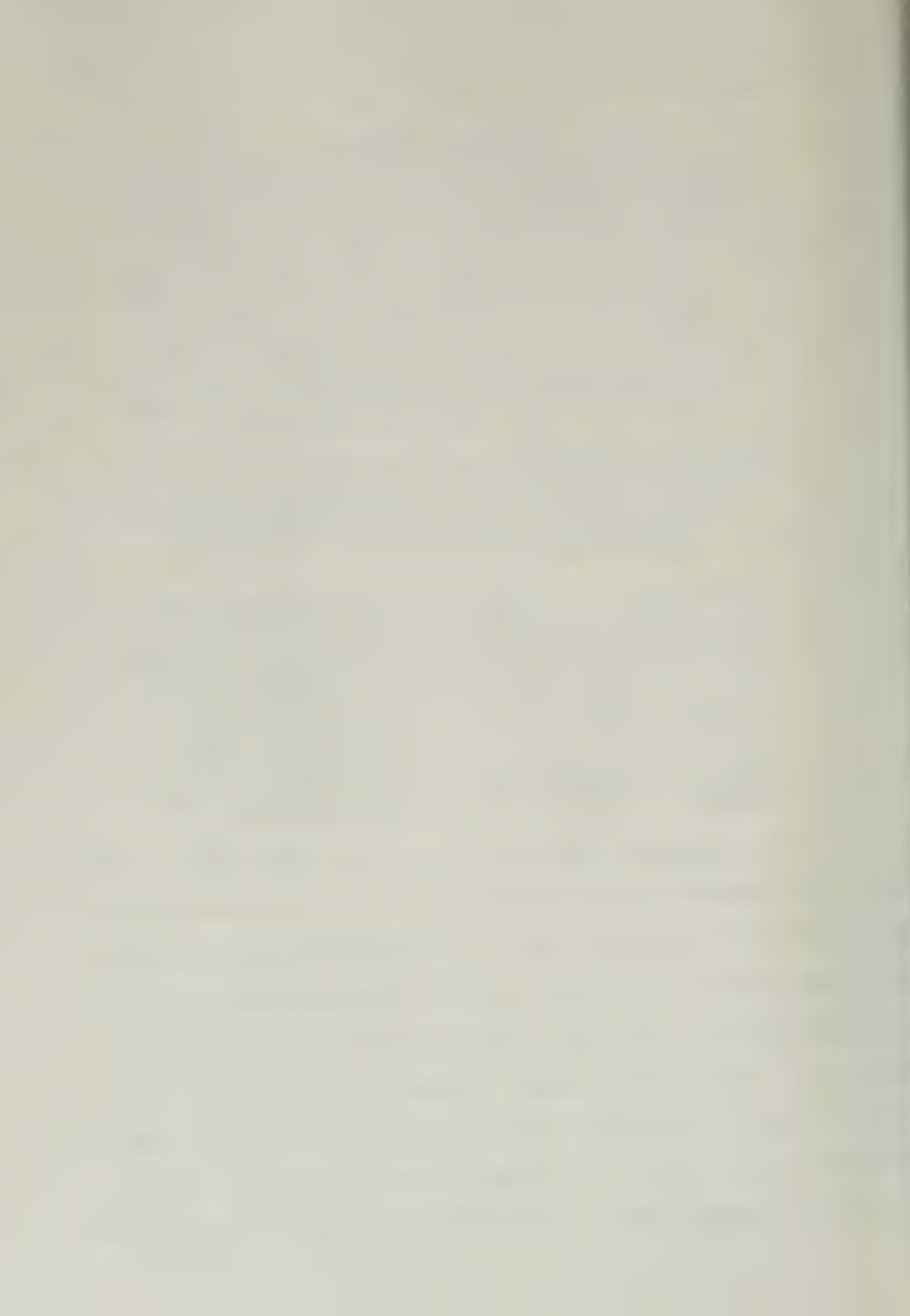
Instruction No. 15 reads:

"The plaintiff, Albert F. Monsma, may waive any of the provisions of the policy with regard to cancellation. The waiver may be by express words or may be inferred from the conduct of the plaintiff. Defects, if any, in the cancellation of an insurance policy may be waived by acceptance by the insured of such cancellation after learning of it; or by acquiescence by the insured in the purchase of another insurance policy to replace the cancelled policy; or by the insured making a claim against such subsequent insurance company. A waiver once made cannot be recalled.

The test is whether such acts or conduct by the plaintiff would indicate to a man of ordinary judgment and prudence that the plaintiff intended to waive any such defects in the cancellation of the policy.

Therefore, if you find from the evidence that an insurance contract came into effect between the plaintiff and the defendant, and that the defendant cancelled such insurance policy, but that there were technical defects in such cancellation; but that the ~~xxx~~ plaintiff waived such defects as above defined, then your verdict must be for the defendant notwithstanding your finding on any other issues submitted to you in this case." (R.357)

The appellant first urges that the Interrogatory No. 4 is inconsistent with Interrogatory No. 3. The Interrogatory No. 3 which is answered "Yes" indicated that the jury found that the insurance company through its agent cancelled the insurance policy. The only contention on the part of the appellee is that the insurance company mailed notices of cancellation to the appellant and, therefore, the only method of cancelling it would have been through the mail. Then, under Interrogatory No. 4 the jury found that if there were



any defects in the method of cancellation that they had been waived. But this is inconsistent with Number 3 for the reason that if it were cancelled and done by mail, then there are no defects to be waived. In any event, this Interrogatory No. 4 permits broad speculation by the jury, since defects in the method of cancellation cannot be shown by the record.

It is true that Instruction No. 15 infers that defects may be waived by acceptance of such cancellation after learning of it or by acquiescence by the insured in the purchase of other insurance, none of which can be supported by the record. However, the objection which is before this court is to the interrogatory and Instruction No. 15 can probably be considered only as it relates to the Interrogatory No. 4. The inconsistency of both Instruction No. 15 and Interrogatory No. 4 is with the actual proof that it was offered by the defense, namely, that the policy was cancelled by mailing notices.

The first time the question of waiver came up was in the proposed instructions, since there is no evidence offered on this, and it was not pleaded in the defendant's answer. (R. 178-181)

"Waiver" is an affirmative defense under Rule 8 of the Federal Rules of Civil Procedure and is required to be set forth affirmatively. However, the position taken by appellant is that there was no evidence to support waiver, anyway.

The law on waiver is adequately set forth in 28 Am.

"§157. GENERALLY: EXISTENCE OF RIGHT, PRIVILEGE,
OR ADVANTAGE.

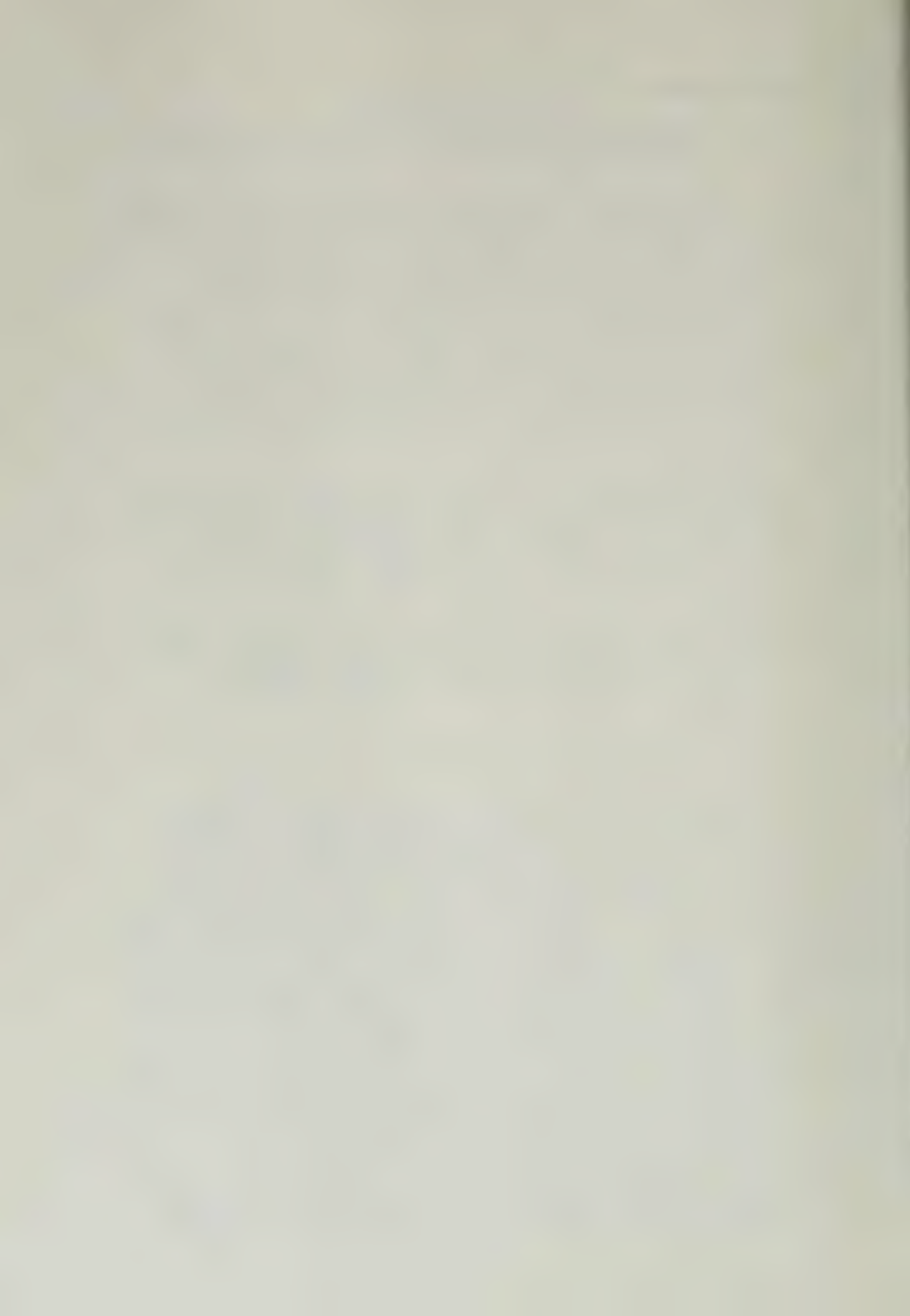
The term 'waiver' implies a choice or an election to dispense with something of present value or to forgo some present advantage. Therefore, to constitute a waiver, the right or privilege claimed to have been waived must generally have been in existence at the time of the purported waiver. A person cannot waive a right before he is in a position to assert it. It is not required, however that in order for a right to be waived it should be one upon which an action would lie at the time.

Voluntary choice is of the very essence of waiver. It is a voluntary act which implies a choice by the party to dispense with something of value, or to forgo some right or advantage which he might at his option have demanded and insisted on.

No fraud or misrepresentation is necessary for a waiver. Nor is it a requisite of a waiver, as it is of an equitable estoppel, that prejudice result to the party in whose favor the waiver operates.

§158. KNOWLEDGE AND INTENTION.

It must generally be shown by the party claiming a waiver that the person against whom the waiver is asserted had at the time knowledge, actual or constructive, of the existence of his rights or of all the material facts upon which they depended. No man can be bound by a waiver of his rights unless such waiver is distinctly made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights and intends to waive them must plainly appear. Ignorance of a material fact negatives waiver, and waiver cannot be established by a consent given under a mistake or misapprehension of fact. Waiver presupposes a full knowledge of an existing right or privilege and something done designedly or knowingly to relinquish it. However, it is not necessary, in order to waive a claim, that a party be certain of the correctness of the claim and of its legal efficacy; it is enough if he knows of the exis-



tence of the claim and of its reasonably possibly efficacy.

Waiver is mainly, or essentially, a matter of intention. Thus, a prerequisite ingredient of the waiver of a right or privilege consists of an intention to relinquish it. Indeed, the essence of a waiver, as indicated by its definition, is the voluntary and intentional relinquishment of a known right, claim, or privilege. Whether an alleged waiver is expressed or implied, it must be intentional. Mere negligence, oversight, or thoughtlessness does not create a waiver. In some instances, however, a statutory waiver may be established without proof of an actual intention to relinquish a known right..."

This court in a 1963 case appears to substantially follow the above text authority as indicated by the following:

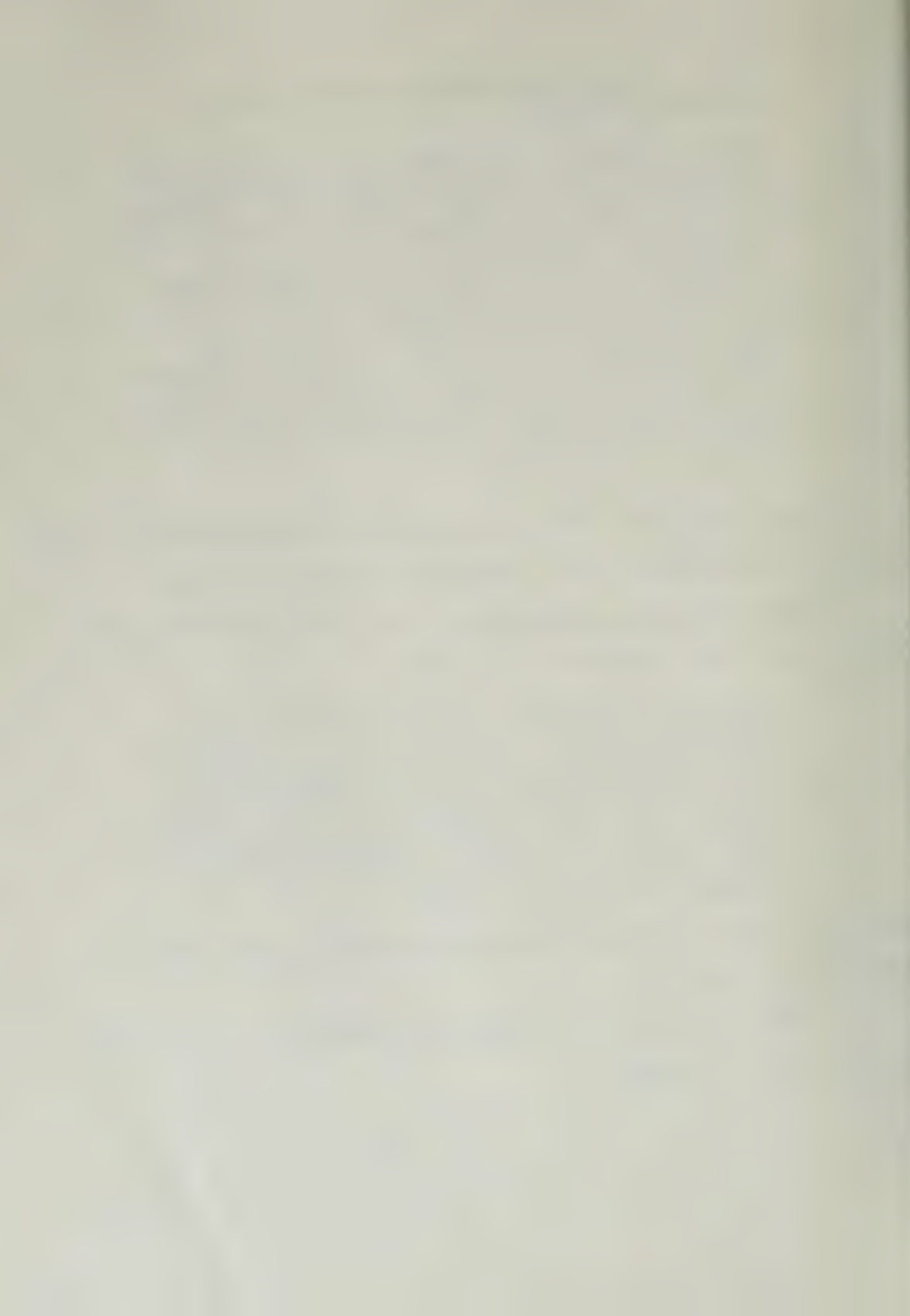
United States v. Chichester, 312 F.2d, 275 (CA 9, 1963)

wherein the court states at page 283:

"[6] From our review of the decisions, and assuming without deciding that other elements absent from this case need not be present, we are satisfied that as minimum requirements to constitute an implied waiver of substantial rights, the conduct relied upon must be clear, decisive and unequivocal showing a purpose to waive the legal rights involved before such conduct constitutes a waiver..."

Also in accord, Pacific States Corporation v. Hall, 166 F.2d, 668, (CA 9, 1948).

The jury should not have been permitted to speculate on the issue of waiver.



B. NO INTERROGATORIES SHOULD HAVE BEEN GIVEN.

The appellant objected to the giving of any interrogatories upon the ground that there was no basis for the giving of such interrogatories. (Tr. 378-379) In view of what happened, namely, the inconsistent findings under interrogatories Nos. 3 and 4, it now appears that interrogatories were confusing and misleading. And, further, the jury did apparently reach a verdict without even answering the interrogatories, since the verdict was brought in on the morning of the 9th of September, 1966, in blank. Perhaps the reason that the interrogatories were not answered was that they were confusing and misleading. (Suppl. Transcript 1.)

It should be noted that Instruction No. 42 adequately instructed the jury on the Special Verdict which further supports the proposition that they were undoubtedly confused and misled by the special interrogatories.

No valid reason has ever been put forth by the court or by the appellee as to why isolated issues should be selected for emphasis by way of special verdict in this case. No special findings were needed by the court for any purpose, since this was a simple suit for money based upon an insurance policy and a fire loss. In addition, the jury had been adequately instructed by some forty-four instructions and one supplemental instruction that there was no need to emphasize the issues against the plaintiff, appellant, herein.

The purpose of the Special Verdict appears to be set forth in 90 ALR 2d, 1041:

"§1. INTRODUCTION.

A special verdict is one in which the jury finds the facts, and the decision of the cause is made by the court. A special finding, which is made in response to a special interrogatory propounded with reference to a particular fact, is made in connection with a general verdict.

The design of special verdicts, issues, or interrogatories is to obtain to the greatest extent possible the decision of the jury without reflection of the bias or prejudice of the jury. The intent is to obtain an answer that does not reflect the jury's opinion or knowledge as to the effect of their answer on the ultimate rights or liabilities of the parties.

To achieve the stated goal it is often announced that a trial court should not inform the jury of the effect of their special verdict or finding upon the ultimate rights or liabilities of the parties. It is desired that the jury not know how to answer to enable a particular party to prevail. There is a recognized exception to the general rule, to the effect that it is not error to inform the jury of matters that they necessarily know as a result of the conduct of the trial..."

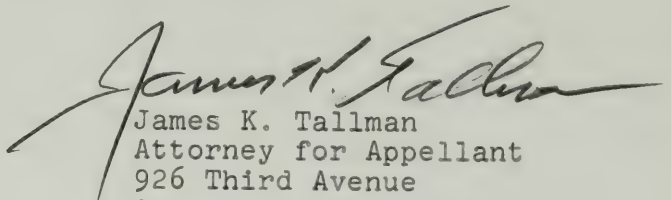
It does not appear that in the case at Bar any of the basic reasons set forth above were present in the case at Bar and the Special Verdict should not have been given.

CONCLUSION

In conclusion, appellant contends that anyone or all of the above designated errors is so prejudicial as to warrant a new trial.

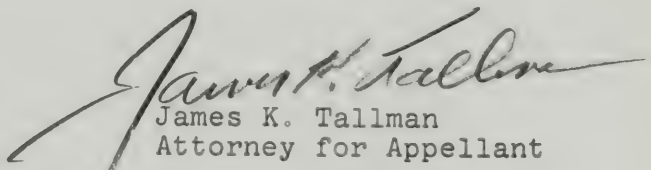
Appellant respectfully requests that judgment of the Court below be reversed and a new trial ordered.

Respectfully submitted this 7th day of July, 1967.


James K. Tallman
Attorney for Appellant
926 Third Avenue
Anchorage, Alaska

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.


James K. Tallman
Attorney for Appellant

NO. 21,085

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT F. MONSMA,

Appellant

vs

GENERAL MUTUAL INSURANCE COMPANY,

Appellee

BRIEF OF APPELLEE

DAY, WILES, MOORE & HAYES
Attorneys for Appellee
General Mutual Insurance Company
1111 Street
Anchorage, Alaska

FILED

SEP 11 1967

WM. B. LUCK, CLERK

SEP 10 1967

SUBJECT INDEX

	<u>Page</u>
JURISDICTION AND PLEADINGS	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	17
Argument No. 1	17
Argument No. 2	18
Argument No. 3	19
Argument No. 4	21
ARGUMENT	22
I. The Court Committed No Error in Submitting to the Jury Supple- mental Instruction No. 1, after the Jury had Retired	22
II. The Court did not Commit Reversible Error by Submitting to the Jury the Special Interrogatory concerning Novation	42
III. The Court Did Not Commit Prejudicial Error By Submitting Interrogatory No. 4 Pertaining to Waiver, Since There Was Evidence of Waiver	47
IV. The Trial Court Did Not Abuse Its Discretion in Submitting The Interrogatories to the Jury	57
CONCLUSION	61

TABLE OF AUTHORITIES CITED

<u>Cases</u>	<u>Page</u>
Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd., 369 U.S. 355, 82 S.Ct. 780, 7 L.ed. 2d 798, rehearing denied 369 U.S. 882, 82 S.Ct. 1137, 8 L.ed. 2d 284, motion denied 371 U.S. 803, 83 S.Ct. 15, 9 L.ed. 2d 51 (1962)	55
City of Philadelphia v. London, 293 F.2d 926 (3rd Cir. 1961).	27
Dallas Ry. & Terminal Co. v. Sullivan, 108 F.2d 581 (5th Cir. 1940).	39
Davis v. Erickson, 53 Cal. 2d 860, 350 P.2d 535 (1960)	24
DeEuginio v. Allis-Chalmers Mfg. Co., 210 F.2d 409 (3rd Cir. 1954)	60
Diniero v. United States Lines Co., 288 F.2d 595 (2d Cir. 1961)	44, 60
Dower v. United Air Lines, 329 F.2d 684 (9th Cir. 1964)	47
Finley v. New Brunswick Fire Ins. Co. 193 Fed. 195 (E. D. Wash. 1911)	48, 50, 51
Fredericks v. American Export Lines, 227 F.2d 450 (2d Cir.), Cert. den. 350 U.S. 989, 76 S.Ct. 475, 100 L.ed. 855 (1955)	28
Gallick v. B. & O. Ry. Co., 372 U.S. 108, 83 S.Ct. 659, 9 L.ed. 2d 618 (1963)	55
Greitz v. Sivachenko, 143 Cal.App. 2d 146, 299 P.2d 374 (1956)	26
Greyhound Corp. v. Blakely 262 F.2d 401 (9th Cir. 1958)	47

Gunderson v. All America Commerce Corp., 275 App. Div. 572, 90 NYS 2d 3 (1949).	28
Hagner v. United States, 285 U.S. 427, 52 S.Ct. 417, 76 L.ed 861 (1931)	36
Hargrave v. Wellman, 276 F.2d 948 (9th Cir. 1960).	29, 43
Hartsfield v. Carolina Cas. Ins. Co., 411 P.2d 396 (Alaska 1966)	34
Holloway v. Dunham, 170 U.S. 615, 18 S.Ct. 784, 42 L.ed 1165 (1898)	36, 54
Keeling v. Travelers Ins. Co., 67 P.2d 944 (Okla. 1937)	35
Larson v. General Motors Corp., 148 F.2d 319 (2d Cir. 1945)	38
Lee v. United States, 238 F.2d 341, (9th Cir. 1956).	30
Martin v. United Fruit Co., 272 F.2d 347 (2d Cir. 1959)	43, 58
Metropolitan Life Ins. Co. v. Fugate, 313 F.2d 788 (5th Cir. 1963).	48, 56, 57
Miscione v. Penn. R. Co., 284 F.2d 428, (2d Cir. 1960)	40
Mutual Service Cas. Ins. Co. v. Overholser, 58 NW 2d 268, (Minn. 1953)	28
Odekirk v. Sears Roebuck & Co., 274 F.2d 441, (7th Cir.) cert. den. 362 U.S. 974, 80 S.Ct. 1060, 4 L.ed. 2d 1011 (1960)	38
Pagliero v. Merchants Fire Assurance Corp. of N. Y., 169 F.2d 375 (9th Cir. 1948)	49, 51
Palmer v. Hoffman, 318 U.S. 109, 119, 63 S.Ct. 477, 483, 89 L.ed. 645 (1942)	29, 43

Pasquel v. Owen, 186 F.2d 263 (8th Cir. 1950)	57
Polara v. Trans World Airlines, 284 F.2d 34, (2d Cir. 1960)	28
Rosenthal v. Walker, 111 U.S. 185, 4 S.Ct 382, 28 L.ed 395 (1883)	36
Smith v. Welch, 189 F.2d 832 (10th Cir. 1951)	60
Stoddard v. Rheem, 13 Cal. Rptr. 496 (1961)	25, 26
Terminal R. Ass'n. of St. Louis v. Staengel, 122 F.2d 271, (8th Cir.), cert. den. 314 U.S. 680, 62 S.Ct. 181, 86 L.ed. 544 (1941)	39
Texas Pac. Ry. v. Griffith, 265 F.2d 489 (5th Cir. 1959)	60
United States v. Six Dozen Bottles, etc., 158 F.2d 667 (7th Cir. 1947)	38, 45
Warmuth v. Greenberg, 49 So. 2d 793, (Fla. 1951)	28
Wilson v. Southern Farm Bureau, 275 F.2d 819, (5th Cir.) cert. den. 364 U.S. 817, 81 S.Ct. 49, 5 L.ed. 2d 48 (1960).	

Statutes

28 U.S.C.A. §1291	2
28 U.S.C.A. § 1332 and 1441	1

Rules

Federal Rules of Civil Procedure Rule 15(b)	57
Federal Rules of Civil Procedure, Rule 49(b)	21, 60
Federal Rules of Civil Procedure, Rule 51	21, 29

United States Courts of Appeals Rules,
Ninth Circuit, Rule 18(2)(d)

30, 47

Texts

Appelman, Insurance Law and
Practice, (1st ed. 1942)
§4183, pp. 714-715

48

Mathes and Devitt, Federal Jury
Practice and Instructions,
(1st ed. 1965) §71.04

31

McCormick on Evidence,
(1st ed. 1954) §311

31, 32, 36

McCormick on Evidence
(1st ed. 1954) §316

32, 33

Medina, C. J.

44

5 Moore, Federal Practice,
§49.03

61

Wigmore on Evidence,
3d ed. 1940 §2494

34

Wigmore on Evidence,
3d Ed. 1940 §2519(B)

33, 36

NO. 21,685

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT F. MONSMA,)
)
Appellant)
)
vs)
)
CENTRAL MUTUAL INSURANCE COMPANY,)
)
Appellee)
)

BRIEF OF APPELLEE

I

JURISDICTION AND PLEADINGS

This suit was originally commenced in the Superior Court, State of Alaska, Third Judicial District, at Anchorage, Alaska, by the Appellant, Albert F. Monsma, against the Appellee, The Central Mutual Insurance Company, and against The Glens Falls Insurance Company and the Kansas City Fire and Marine Insurance Company. (R. 3). In the Superior Court of the State of Alaska, the suit was designated as Civil Suit No. 65-1003D. (R. 3). Thereafter, and in accordance with the provisions of 28 U.S.C.A. §§ 1332 and 1441, the Appellee removed the case to the United States District Court for the District of Alaska at Anchorage, Alaska, and the case was thereafter designated as Civil Suit No. A-63-65. (R. 1, 19). This removal was based upon the undisputed fact that there was diversity of

citizenship between the Appellant and the Appellee and other defendants hereinbefore named and that the amount in controversy was in excess of \$10,000.00 exclusive of costs and interest. (R. 2, 3, 8, 19).

On October 22, 1965, Appellant filed an Amended Complaint, (R. 125), and Appellee filed its Answer there- to on July 24, 1966. (R. 178). On August 2, 1966, a Judgment of Partial Dismissal was entered, dismissing the action as to all parties except the Appellant and Appellee herein. (R. 251). On August 16, 1966, Appel- lee filed a Supplemental Answer to Appellant's Amended Complaint. (R. 261).

Subsequently, on September 1, 1966, the matter came to trial (R. 292), and on September 9, 1966, the trial concluded with a Verdict for the Appellee. (R. 393, Supp. Tr. 5, 7). On September 22, 1966, Judgment for Appellee was entered. (R. 403). Subsequently, on September 27, 1966, Appellant moved for new trial. (R. 407). Such motion was denied on November 18, 1966, and Appellant brought the present appeal. (R. 430). Accord- ingly, this is a direct appeal from a final decision of the United States District Court, and this Court has juris- diction pursuant to 28 U.S.C.A. §1291.

II

STATEMENT OF THE CASE

On January 16, 1965, a private dwelling located at 2200 C Street in Anchorage, Alaska was damaged by fire. (R.220). On that date, Appellant, Albert F. Monsma, was the contract purchaser of such property from Bailey E. Bell and Virginia Tallman Reis who each held an undivided one-half interest subject to Appellant's interest. (R. 59, 90, 92).

In 1961, Appellant had contracted to purchase the premises in question, and in 1963 he placed the title to same in the name of his now-divorced wife, whose present name is Marian M. Cox (hereinafter referred to as "Mrs. Cox"). (Tr. 31, 258). On August 24, 1964, Mrs. Cox contracted to purchase the fire insurance policy herein involved from Appellee through the Ken C. Johnson Agency. (Tr. 259). Mrs. Cox specifically requested that she be designated as policy beneficiary and her request was granted. (R. 178; Tr. 238, 260). Instead of paying the entire year's premium at the time she contracted to purchase the policy, Mrs. Cox paid one-half of the premium and promised to pay the balance within thirty days. (Tr. 238, 260). The Ken C. Johnson Agency was contractually obligated to Appellee to pay the entire year's premium. (Tr. 239-240). Neither Mrs. Cox, Appellant nor anyone

else ever paid the balance due on the policy. (Tr. 239, 240, 260). A divorce action was commenced in April of 1964 between Mrs. Cox and Appellant; subsequently, on September 24, 1964, a hearing was held with regards to this divorce action. (Tr. 259). On or about the same date, Mrs. Cox quit-claimed her interest in the premises to Appellant. (Tr. 262, 282-283). On or about September 26, 1964, Mrs. Cox informed Appellant that she had previously contracted to purchase the policy herein involved, and Appellant, since the premises had been quit claimed to him, gave Mrs. Cox a check to reimburse her for the one-half premium payment she had made. (Tr. 263-264). The Ken C. Johnson Agency, prior to the fire, did not know that Appellant had given Mrs. Cox this check, since Mrs. Cox never informed the Johnson Agency that she had received the check from Appellant. (Tr. 250, 264). Mrs. Cox thereafter went to the office of the Ken C. Johnson Agency and requested that the policy be assigned to the Appellant. (Tr. 241). And accordingly, an endorsement was added to the policy assigning it to Appellant. (Tr. 241, 242).

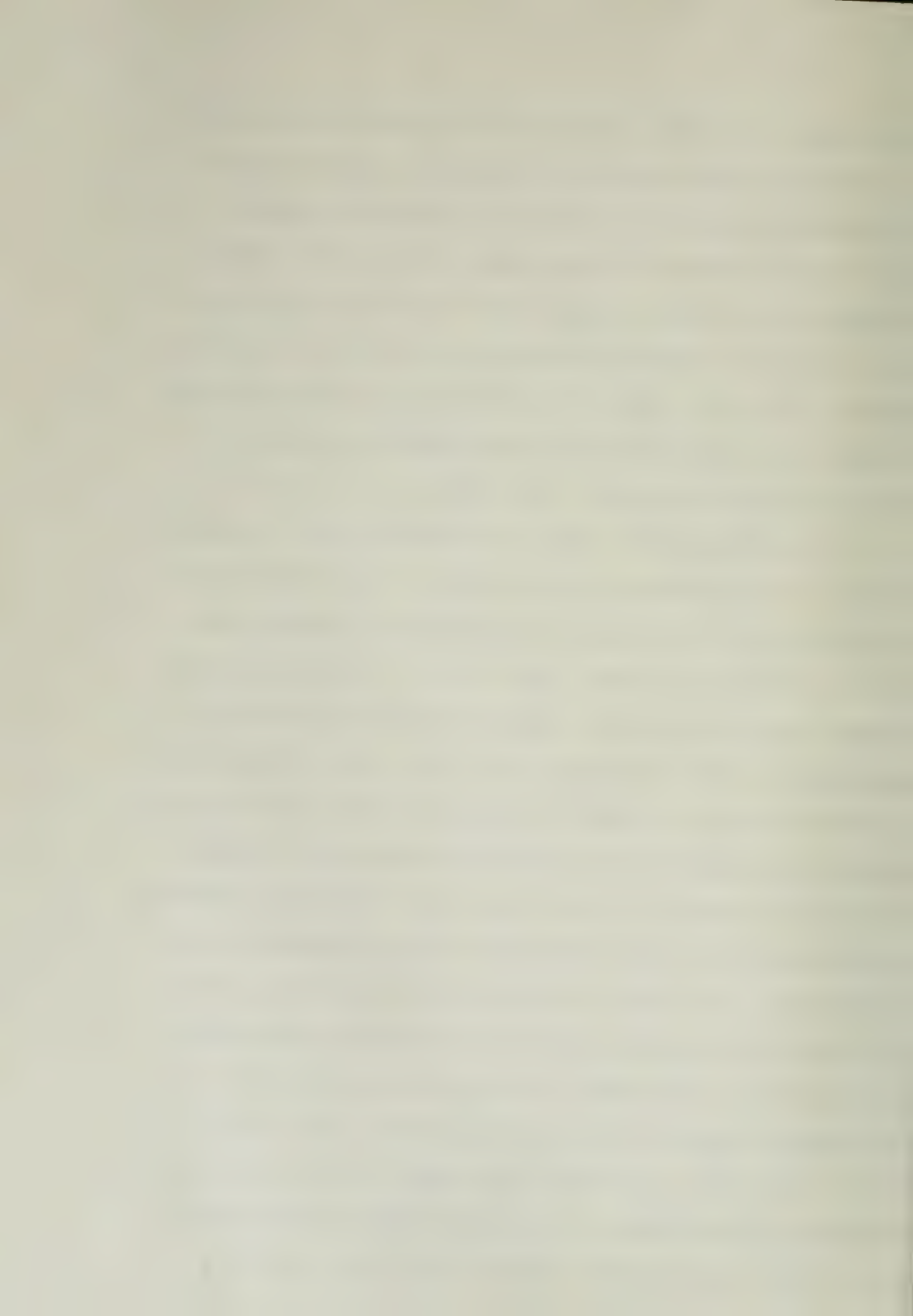
On December 23, 1964, Appellee, acting by and through its agent, the Ken C. Johnson Agency, mailed a notice of cancellation to Appellant at 2200 C Street, Anchorage, Alaska. (Tr. 179, 245, 319-320).

Mr. Norbert E. Segelhorst, Manager of the Ken C. Johnson Insurance Agency (Tr. 234), testified that on December 23, 1964, (Tr. 245), a notice of cancellation was mailed to Appellant at 2200 C Street, Anchorage, Alaska. and that two copies of the notice were mailed to the First National Bank, Eastchester Branch, Box 720, Anchorage, Alaska. (Tr. 245). He testified that the reason that two copies of the notice of cancellation were sent to the Bank was that the Bank had a real estate interest and mortgage interest in the property as well as the fact that they were an escrow agent for Virginia Tallman Reis and for Mrs. Cox. (Tr. 248). Mrs. Beverly Kirkpatrick, a fire insurance clerk at the Ken C. Johnson Agency (Tr. 317, 318), corroborated Mr. Segelhorst's testimony. She testified that she prepared the notice of cancellation and mailed it to Appellant at 2200 C Street. (Tr. 319). Furthermore, she testified that the signature on the certificate of mailing of the notice of cancellation was her signature. (Tr. 319). In addition, she affirmed that two copies of the notice of cancellation were mailed to the First National Bank of Anchorage. (Tr. 319). She stated that the date of mailing of the notice of cancellation was December 23, 1964, and that the effective date of the cancellation was to be January 4, 1965. (Tr. 320). Mr. Marwin L. Smith, manager of the First National Bank

of Anchorage (Tr. 196), further corroborated the testimony of both of the foregoing witnesses. He testified that the Bank received a copy of the notice of cancellation that was mailed to Appellant. (Tr. 199). Both Mr. Segelhorst and Mrs. Kirkpatrick testified that none of the notices of cancellation that were mailed were ever returned. (Tr. 248, 320). Mr. Segelhorst testified that the reason that the policy was cancelled was that the premiums had not been paid. (Tr. 248).

Mr. Segelhorst testified that Mrs. Cox informed the Ken C. Johnson Agency at the time of the "assignment" of the policy to Appellant that Appellant's address was Box 4-419, Spenard, Alaska. (Tr. 243). Bills and other documents sent to this Box number, however by the Ken C. Johnson Agency were returned. (Tr. 243, 250). The notice of cancellation was therefore mailed to Appellant at the insured's premises at 2200 C Street, Anchorage, instead of Box 4-419, Spenard. (Tr. 245, 319). Appellant admitted that this was the proper address to mail documents to him in Anchorage. (Tr. 126, 94, 99, 356). He had no post office box in Fairbanks and did not regularly check general delivery in Fairbanks. He had not used the Box 4-419 Spenard mailing address since 1960. (Tr. 122).

Mrs. Cox testified that when she moved from Anchorage she submitted to the post office a change of address card changing her address from 2200 C Street,



Anchorage, to Star Route A, Box 2006, Spenard. (Tr. 268-269). She unequivocally testified that she did not put her husband's name on the change of address card. (Tr. 269). Furthermore, she testified that in October of 1965, she submitted to the post office another change of address card changing her address from 2200 C Street to 13431 Brook Green Drive, Dallas, Texas. (Tr. 269). She again testified that on this latter change of address card she did not place her husband's name. (Tr. 269). Furthermore, the two change of address cards were admitted into evidence. (Tr. 270).

At the time that the notice of cancellation was mailed, Appellant was residing in Fairbanks. (Tr. 87). Furthermore, between November of 1963 and November of 1964, Appellant changed addresses in Fairbanks five times. (Tr. 88). However, he at no time submitted a change of address card to the post office, nor did he ever notify Appellee of his changed address. (Tr. 88, 95, 102).

However, Appellant testified that Fred Thomas, tenant at 2200 C Street forwarded Appellant's mail to him. (Tr. 357). At another point, Appellant testified that the Thomases impressed him as being responsible persons. (Tr. 127). At yet another point, Appellant testified that he was certain that if bills for the premiums had been mailed to him at 2200 C Street he would have received them. (Tr. 126). Moreover, he stated that 2200 C Street

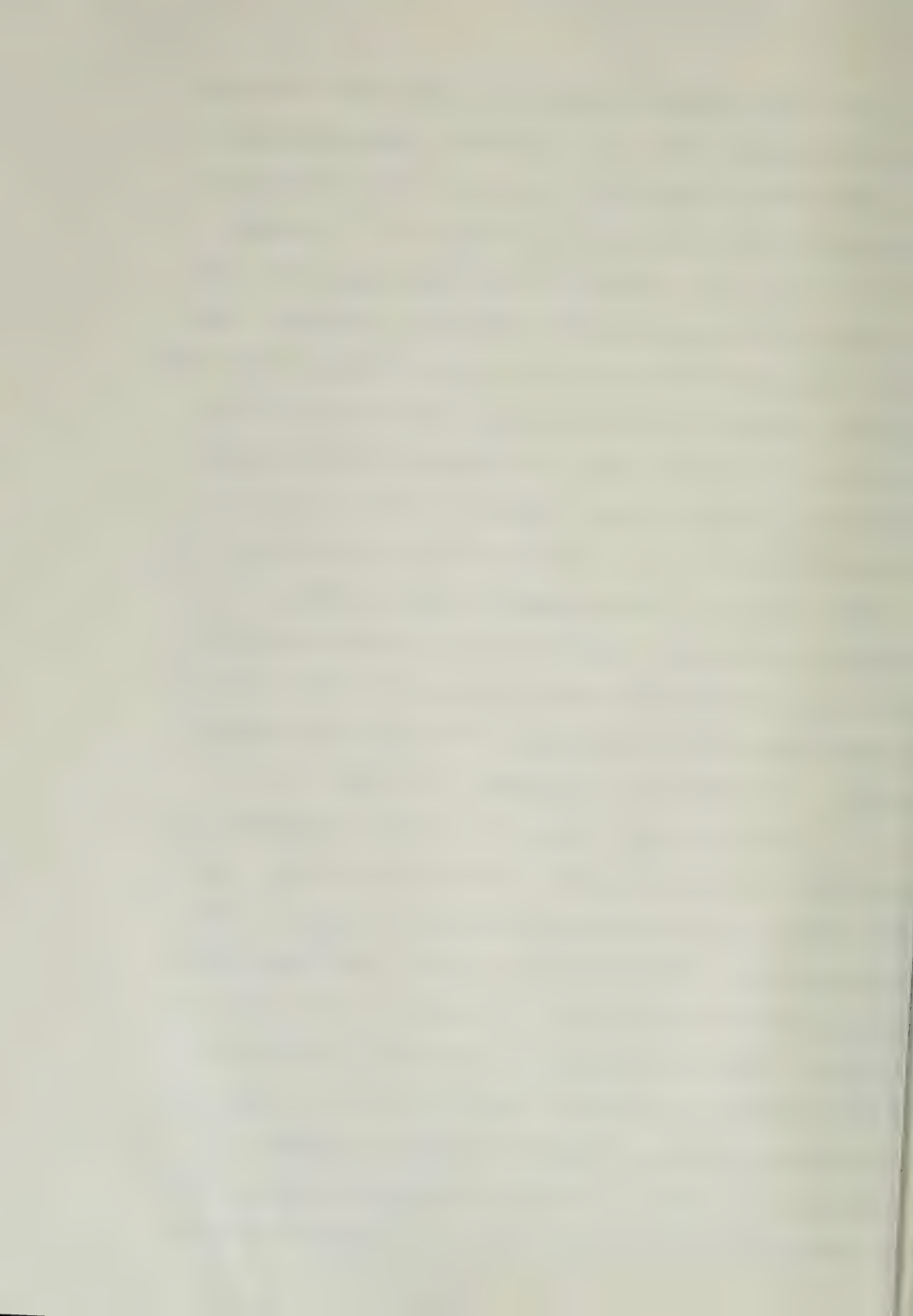
was his last known Anchorage address and that "all his legal papers and all came to this address" and were forwarded to him. (Tr. 94). Furthermore, he testified that he knew he would have received any mail sent to 2200 C Street. (Tr. 126). In addition, he testified that he did receive various mail sent to 2200 C Street. (Tr. 356). He admitted that he described 2200 C Street in his deposition as his "home address". (Tr. 99).

Moreover, it appears that Appellant may have been in Anchorage during the week following the day when the notice of cancellation was mailed, and in contact with the tenants in the premises at 2200 C Street. Appellant testified that he was in Anchorage in December and talked to the Thomases. At first he stated that he believed that this was between the 15th and 20th of December. Subsequently, however, he admitted that he believed he was in Anchorage until "after Christmas". (Tr. 350). Thus, the jury might reasonably have inferred that Appellant actually received the notice of cancellation while visiting the Thomases during the week of December 23 to December 30th.

At one point, Mrs. Cox testified that she received the notice of cancellation that was addressed to Appellant at 2200 C Street, (Tr. 273, 275). Further, she testified that she opened the envelope containing the notice of cancellation addressed to Appellant, and

that she then retaped the envelope closed and remailed it to the sender. (Tr. 276). (Both Mr. Segelhorst and Mrs. Kirkpatrick testified that none of the notices of cancellation were returned (Tr. 248, 320)). However, in the pages of the transcript following page 276, the testimony of Mrs. Cox becomes thoroughly confused. She later testified that she did not really remember what she did with the notice of cancellation that was mailed to Appellant. (Tr. 277, 280). Furthermore, she revealed substantial confusion over whether or not she actually did receive a notice of cancellation mailed to Appellant at 2200 C Street. Her testimony seemed to admit of the possibility that what she did receive that was addressed to Appellant was in fact a billing for the premium or some other document instead of the notice of cancellation. (See generally Transcript 283-303).

In any event, there is no doubt whatsoever that Appellant had actual notice of the cancellation. Appellant admitted that he received a letter and/or a telephone call from Bailey E. Bell prior to the fire advising him of the cancellation. (Tr. 62, 63, 67, 352). Mr. Bailey E. Bell was an Anchorage attorney, who was one of the original plaintiffs in this action, and who, on at least one occasion signed pleadings on behalf of Appellant. (R. 132). Other evidence, including the testimony of Mr. Bell also clearly establishes that he



received such a letter and telephone call, (Tr. 62, 63, 67, 335, 337, 340-341), and indeed, Mr. Bell's letter was admitted into evidence for whatever weight it was entitled to on the question of whether Appellant had notice of the cancellation. (Tr. 71).

Appellant admits that Bailey E. Bell advised him in both a letter and a telephone call that he had purchased a new or substitute policy in the amount of \$15,000.00, (Tr. 335), and that he (Bell) would look to Appellant for payment of premiums on the substitute policy. (Tr. 352). Evidently Appellant acquiesced in this demand. Appellant never made any attempt to contact the Ken C. Johnson Agency or to purchase other insurance between the time he was contacted by Mr. Bell and the time of the fire. (Tr. 115). At one point in his pleadings, Appellant admitted that Bailey E. Bell was his agent in procuring the substitute policy. (R. 130). The substitute policy was issued jointly by the Glens Falls Insurance Company and The Kansas City Fire and Marine Insurance Company, and had as named insureds Virginia Tallman Reis, Bailey E. Bell, and Appellant. (Tr. 336). Appellant admitted that he felt that the substituted policy was sufficient, (Tr. 75, 353) and that he felt that the policy issued by Appellee was replaced by the policy which Bailey E. Bell had purchased from the Glens Falls and Kansas City companies. (Tr. 353). One of Appellant's admissions in his deposition makes this

quite clear:

Q. I mean between January 7th and January 16th, did you make any inquiries, contact any insurance agents, in any way seek to either get a policy, a new policy or make sure that this was reinstated or anything of that nature?

A. Bailey's was in effect. (Tr. 354).

In addition to making the instant claim against Appellee insurance company, Appellant also claimed against the Glens Falls and Kansas City policy. (R. 127). Subsequently, a settlement was effected with Glens Falls Insurance Company, and the Kansas City Fire and Marine Insurance Company for \$12,500.00 and it was stipulated between Appellee and Appellant that any recovery from Appellee would be reduced by that sum. (R. 265).

Appellee has at all times maintained that if there were any defects in the cancellation, they were waived by Appellant by his bringing a claim against Glens Falls and Kansas City and/or by his acceptance of the Glens Falls and Kansas City policy as a substitute for the cancelled policy issued by Appellee. (R. 277 et. seq.)

On September 1, 1966, the trial court ordered that proposed instructions be submitted to the court and served upon opposing counsel not later than 4:00 P.M. on September 6, 1966. (R. 290). On September 8, 1966, both Appellee and Appellant submitted additional proposed

instructions, among which was Appellee's Additional Proposed Instruction No. 27. (Tr. 376). The trial judge waived time limits on proposed instructions and allowed them to be submitted on September 8, 1966. (Tr. 376). Appellant certified that he received Appellant's Additional Proposed Instruction No. 27 on September 7, 1966. (R. 330).

On September 8, 1966, between 11:03 A.M. and 11:10 A.M., the trial judge informed both counsel of his proposed action on their requested instructions. (R. 338, Tr. 371). On September 8, 1966 between 12:45 P.M. and 1:30 P.M. counsel stipulated that the trial jury retire to consider their verdict and that objections to the court's instructions be taken as of record as though they had been taken prior to the time the jury retired. (Tr. 372, R. 338). On September 8, 1966, at 1:30, the jury, after being duly instructed, retired, taking with them the court's instructions which did not include Appellee's Additional Proposed Instruction No. 27. (R. 338). On September 8, 1966 between 3:35 and 4:10, pursuant to the stipulation of counsel, objections to the court's instructions were heard. (R.339). Counsel for Appellant expressly agreed to the hearing of these objections at 3:30 P.M.:

THE COURT: Counsel, I don't want to rush you on objections. Would you rather come back at 3:15 or 3:30 and take your time making objections.

MR. TALLMAN: That would be ok with me,
your Honor ... (Tr. 373).

At about 3:45 P.M., counsel for Appellee objected to the court's failure to instruct on the issue of novation. (Tr. 375, R. 339). Then counsel for Appellee objected to the court's failure to instruct the jury in accordance with Appellee's Additional Proposed Instruction No. 27, (Tr. 375), the text of which was:

"You are instructed that there is a presumption that letters mailed in the ordinary course of the mails reach the address to which they are addressed." (R. 331).

The court informed counsel that it had intended to give that instruction but had inadvertently failed to do so (Tr. 379) and that it might yet submit that instruction. (Tr. 376, 379) At or about 4:30 P.M., the court, having prepared Supplemental Instruction No. 1, predicated upon Appellee's Additional Proposed Instruction No. 27, indicated that it would submit the supplemental instruction to the jury. (Tr. 380, 382; R. 339). At this time, Appellant objected to the submission of Supplemental Instruction No. 1 on the ground that it was belatedly offered and that the submission of it to the jury after they had retired would place undue emphasis on it. (Tr. 380). At no point did Appellant object to the instruction on the ground that it incorrectly stated the law or that it should not be submitted because of

testimony, which if believed, would rebut the presumption. (Tr. 380). Subsequently at 4:45 P.M., the instruction was submitted to the jury. (Tr. 382; R. 339). The jury was not returned to the jury room to have the instruction read aloud to them, counsel for Appellant agreeing that it would be better to merely hand the instruction to the bailiff to hand to the jury without a reading of it. (Tr. 380, 382). Supplemental Instruction No. 1 contained a cautionary instruction as follows:

The court inadvertently neglected to include this instruction in the instructions previously given you. You are admonished and instructed that you are not for any reason to place undue emphasis on this particular instruction.

You are again instructed that all of the instructions should be considered together as a connected series and regarded as the law applicable to the case. The jury has no right to disregard, or to give special attention to any one of the instructions, or to question the wisdom of any rule of law. (R. 391).

The court initially submitted the necessary general verdict forms to the jury along with a special verdict form containing five interrogatories. (R. 395-396). One of the interrogatories was Interrogatory No.

"Did the plaintiff prior to the fire enter into a novation with the defendant insurance company as defined in the instructions?" (R. 396).

There was, however, no instruction submitted to the jury defining the word "novation". (R. 341 - 391, esp. R. 388). This was because this court had decided not to submit this issue to the jury, and the failure to eliminate Interrogatory No. 3 was a secretarial oversight. (Supp. Tr. 4).

Appellant objected generally to the giving of the special verdict form:

"I would object to the special verdict because I don't feel that there has been a showing as to why we should have this ...". (Tr. 378-379).

However, Appellant did not object specifically to Interrogatory No. 3 nor did he object to the submission of the special verdict on the ground that it would mislead and confuse the jury and would over-emphasize some issues more than others. Appellant did, however, object specifically to Interrogatory No. 4:

"If there were any defects in the method of cancellation, did plaintiff waive such defects." (R. 396).

His objection was grounded on his claim that there was no evidence of any waiver of cancellation. (Tr. 379).

On September 9, 1966, the jury returned a General Verdict for Appellee; however, they had not answered the Special Verdict Interrogatories. (Supp. Tr. 2). Appellee's counsel waived the answering of the Special Interrogatories but Appellant's counsel insisted that they be answered. (Supp. Tr. 2). Accordingly, the jury was

directed to further deliberate and answer the Special Interrogatories. (Supp. Tr. 3). At that point, the jury reman asked:

"On the word 'novation', in one question, does that mean to approach or make a beginning?" (Supp. Tr. 3).

The court replied as follows:

Through error that that was not changed, it was not changed on the copy submitted to the jurors. There are now four interrogatories, and there were previously five. They were changed to four in accordance with instruction No. 42, and that was properly put in the set of instructions given to the court. The second page of the special verdict asked a question with reference to novation but the court by its instruction removed that issue. I held it wasn't an issue in the case, and I refused 3 or 4 instructions which were requested pertaining to that. But my secretary did not change the 2d page and insert the changed page as page No. 2. I have done that now, so insofar as the word "novation" or anything pertaining to novation during the course of the trial, you are instructed to entirely disregard that because the Court decided it was not material. (Supp. Tr. 4).

Following these comments by the trial judge, the jury, at 10:15 A.M., retired to deliberate on the answers to the interrogatories. At 11:25, A.M., a mere one hour and ten minutes after retiring, the jury returned the Special Verdict answering all interrogatories in favor of Appellee (Supp. Tr. 5; R. 340). Appellant then orally moved the trial court to declare a mistrial on the grounds

that the jury had been unduly confused by the interrogatories and by the belated offering of Supplemental Instruction No. 1. (Tr. 6 and 7).

On September 22, 1966, the court denied Appellant's motion for mistrial (R. 398) and judgment for Appellee was entered. (R. 403). On September 27, 1966, Appellant moved for new trial. (R. 407). Such motion was denied on November 18, 1966, and the present appeal followed. (R. 430).

III

SUMMARY OF ARGUMENT

ARGUMENT NO. 1

Appellee contends that the trial court did not prejudicially err by submitting Supplemental Instruction No. 1 to the jury after it had retired to consider its verdict. Several well-considered cases have held, under factual circumstances similar to those of the case at bar, that the belated submission of an inadvertently omitted instruction is proper where a cautionary instruction, similar to the one given in the case at bar, is given at the time that the belated instruction is submitted. Appellee further contends that the innocuous fashion in which the instruction was given surely prevented the jury from giving the instruction undue emphasis. (infra 22-29).

In addition, Appellee contends that Supplemental

Instruction No. 1 properly stated the law, and that there was sufficient evidence that the notice of cancellation had been mailed to render the submission of the instruction proper. Moreover, Appellee contends that the submission of the instruction was not rendered improper by the fact that Appellee denied receiving the notice of cancellation.

(infra 30-36)

However, even if the instruction was improperly given because it was belatedly submitted or because it improperly stated the law, the error was a harmless one, since the jury specially found in Appellee's favor on a separate issue upon which the contested instruction was not material.

(infra 36-38)

Lastly, Appellee contends that its Additional Proposed Instruction No. 27 was not untimely offered. However, even if it was untimely offered, the trial judge did not commit error in accepting it for consideration, since the case law indicates that the judge had a wide discretion in accepting untimely offered proposed instructions.

(infra 40-41)

ARGUMENT NO. 2

Appellee contends that the trial court did not commit reversible error by submitting to the jury the special interrogatory concerning novation, even though no instruction defining the term "novation" was submitted to the jury. There is absolutely no reason to believe

that the jury was unduly confused by the submission of the interrogatory. On the contrary, there is substantial reason to believe that the jury was not confused, since it did not answer the novation interrogatory and, since the jury's eventual answers to the properly submitted interrogatories were completely consistent with its general verdict. In any event, substantial case law exists holding that similar errors by trial judges are not prejudicially erroneous. (infra 42-46)

Furthermore, since counsel for Appellant did not specifically object to the submission of the interrogatory in question, he ought to be held to have waived the objection he now seeks to assert. (Infra 42-43)

ARGUMENT NO. 3

Appellee contends that Instruction No. 15 pertaining to waiver properly stated the law. However, Appellee urges that Appellant ought not be allowed to urge that Instruction No. 15 incorrectly states the law, since Appellant failed to include this objection as a ground for appeal in either his Motion for New Trial, his "Statement of Points Upon Which Appellant Intends to Rely", or in his "Specification of Errors" contained in his instant brief and since it is entirely unclear in Appellant's brief whether in fact Appellant in fact wishes to argue this point. (infra 47-51)

Appellee further contends that there was suffi-

cient evidence that defects in the notice of cancellation had been waived to warrant the submission of Instruction No. 15 pertaining to waiver. (infra 52-53)

In any event, even if Instruction No. 15 erroneously stated the law, a reversal is not warranted, since the jury specially found in Appellee's favor on a separate issue upon which Instruction No. 15 was not relevant. (infra 53-54)

Appellee further contends that the jury's answers to Interrogatories No. 4 and No. 5 were consistent. By its answer to Interrogatory No. 4, the jury found that Appellee properly cancelled the insurance policy. By its answer to Interrogatory No. 5, it found that, even assuming that there were defects in the method of cancellation, plaintiff waived such defects. The jury, by its answer to Interrogatory No. 5, thus did not assert that there were in fact any defects in the method of cancellation, but merely that, assuming there were such defects, they were waived. Since the United States Supreme Court has held that the courts have a strong duty to take that view of the case which makes the jury's answers to special interrogatories consistent, it is clear that the court should construe the answers to the interrogatories in the manner heretofore suggested and thereby find them to be consistent. (infra 54-55_

Lastly, Appellee contends that the defense of waiver was implicitly pleaded as an affirmative defense. Moreover, Appellee contends that Appellant, by not raising this point at any previous time, has waived his right to assert this point. Furthermore, Appellee contends that the issue of waiver was tried by implied consent of the parties, and that therefore, under Rule 51 of the Federal Rules of Civil Procedure, the issue of waiver should be treated in all respects as if it had been raised in the pleadings.

(infra 55-57)

ARGUMENT NO. 4

Appellee contends that, since Appellant did not object to the submission of the interrogatories on the ground that they were misleading, confusing and ambiguous Appellant has waived his right to urge this point on appeal. Furthermore, Appellee contends that Appellant waived any objections to the submission of the interrogatories when he insisted that the jury be ordered to answer them.

(infra 57-60)

Appellee contends that Appellant entirely misconceives the law when he further argues that the trial court should not have submitted any interrogatories because no special showing was made indicating that the interrogatories were necessary. Rule 49(b) of the Federal Rules of Civil Procedure indicates that the question of whether to submit interrogatories to the jury is left

to the discretion of the trial judge, and Appellant has completely failed to show that this discretion was abused by the trial judge.

(infra 60-61)

IV

ARGUMENT

I.

THE COURT COMMITTED NO ERROR IN
SUBMITTING TO THE JURY SUPPLE-
MENTAL INSTRUCTION NO. 1, AFTER
THE JURY HAD RETIRED.

On page 14 of his brief, Appellant urges that the jury was unduly influenced by the trial court's submission of Supplemental Instruction No. 1 to it after it had retired. The instruction in question stated:

You are instructed that where a letter is properly addressed, is properly stamped with sufficient postage thereon and is deposited in a United States Post Office, a presumption arises that the letter reached the address to which it was addressed.

The court inadvertently neglected to include this instruction in the instructions previously given you. You are admonished and instructed that you are not for any reason to place undue emphasis on this particular instruction.

You are again instructed that all of the instructions should be considered together as a connected series and regarded as the law applicable to this case. The jury has no right to disregard, or to give special attention to any one of the instructions, or to question the wisdom of any rule of law. (R. 391).

Appellant cites no cases and offers only the slimmest argument in support of his bare conclusion that the jury was unduly influenced. The thrust of Appellant's argument seems to be that there was no evidence that Appellant did receive the notice of cancellation and therefore, since the jury found that Appellant did receive the notice of cancellation, it must have been unduly influenced by the instruction.

Appellee urges, on the contrary, that there was substantial evidence that Appellant received the notice of cancellation. The evidence is overwhelming and uncontradicted that the notice was mailed to Appellant at 2200 C Street. One of the employees of the Ken C. Johnson Agency testified that the notice was mailed. (Tr. 245), and Mrs. Kirkpatrick, also an employee of the Agency, signed a certificate of mailing at the time she mailed the notice. (Tr. 319-320). Furthermore, other individuals having interests in the property covered by the insurance policy received notices of cancellation. (Tr. 177, 199-201, 273). Moreover, there is substantial circumstantial evidence that Appellant received the notice. Appellant testified that he knew he would have received any mail sent to 2200 C Street, (Tr. 126) and that he did in fact receive various mail sent to 2200 C Street. (Tr. 356). He further testified that 2200 C Street was his last known Anchorage address and that all of his legal papers and other matters were

sent to this address and forwarded to him by Fred Thomas, the tenant at 2200 C Street. (Tr. 94,357).

In the light of the above-mentioned evidence, it is difficult to conceive that Appellant can now seriously urge that there is a complete lack of evidence that Appellant received the notice of cancellation. Furthermore, Appellant's argument that the jury must have been swayed improperly by the instruction in question since it found in Appellee's favor even though there was no evidence of receipt of the notice, must fail.

In any event, substantial case law exists holding that the belated submission of an inadvertently omitted instruction is proper where a cautionary instruction such as the one given by the trial judge in the case at bar, is given to the jury at the time the formerly omitted instruction is given.

In Davis v. Erickson, 53 Cal. 2d 860, 350 P.2d 535 (1960), a ski student brought suit against the operator of a ski school for personal injuries sustained when he was struck by another skier while taking ski lessons. After deliberating for some time, the jury requested that all of the instructions be reread. The trial judge reread all but one of the instructions, inadvertently failing to reread that one instruction. The Appellate court held that the failure to reread the one instruction was prejudicially erroneous. The court then stated:

The argument that to recall the jury to read the omitted instruction would have overemphasized their contents is not persuasive. The court could have admonished the jury not to attach any particular emphasis to the fact that it was reading certain instructions which had been inadvertently omitted in its first reading, thereby protecting despondents from any prejudice in the court's correcting its previous oversight ... (350 P.2d at 538).

In Stoddard v. Rheem, 13 Cal. Rptr. 496 (1961), plaintiff brought suit for wrongful death. The trial judge inadvertently neglected to submit to the jury an instruction concerning the question of whether the decedent had been exercising due care at the time of the accident. Ten minutes after the jury retired, the trial judge called them back and read the instruction to them with the following explanation:

Ladies and gentlemen, in reading these instructions this morning, I have to apologize because one of the instructions apparently was stuck to one of the others and was not read by me ... (13 Cal. Rptr. at 498).

The Appellate court held there was no error and stated:

The explanatory remarks of the judge were not calculated to focus undue attention upon the subject of the instruction. Those remarks, coupled with the cautionary instruction earlier given, "not to select a single instruction, or a portion of any instruction alone, but to consider all of the instructions in determining this case ...," tended to counteract any element of over-emphasis which might otherwise have stemmed from the delayed and separate treatment of the subject of this instruction ...

The absence of error in [this] case is emphasized by the fact that it would have been reversible error if the court had refused to read the instruction in question. (13 Cal. Rptr. at 498-499).

It should be noted that, as in the Stoddard case, (supra), the trial judge in the case at bar submitted several general cautionary instructions in his initial charge to the jury, warning the jury that it was not to single out any one particular instruction and that the order in which the instructions were submitted had no significance as to their relative importance. (R. 344, 381).

In Greitz v. Sivachenko, 143 Cal. App. 2d 146, 299 P.2d 374, (1956), plaintiff brought suit for personal injuries and recovered \$9,500.00. Shortly after the jury retired to deliberate, the trial judge discovered that he had inadvertently neglected to submit an instruction on damages. Accordingly, the jury was recalled, and the omitted instruction was read to them. Before giving the instruction, the trial judge stated:

"The fact that I give it now is not meant to emphasize anything, but it should have been given in its proper place."

After giving the instruction, he again admonished the jury:

"You are not to speculate because I gave it to you at this later time that you are to give the plaintiff damages just because I brought this to your attention."

The Appellate court held:

"Clearly there is no merit in the claim that appellant was in any way prejudiced by the giving of this instruction a few minutes after the jury retired." (299 P.2d at 376).

In City of Philadelphia v. London, 293 F.2d 926 (3d Cir. 1961), plaintiff brought suit against the City for personal injuries sustained when a truck owned by the City collided with a passenger car in which plaintiff was riding. London was the driver of the passenger car and was brought into the suit as a third party defendant by the City. Subsequently, a settlement was reached with the plaintiff. However, the third party claim by the City against London remained and was brought to trial. Several hours after the jury had retired, they still had not reached a verdict, and the judge therefore called them back and exhorted them strongly to try to reach a verdict. After his exhortion, the judge ordered the jury back to the jury room for further deliberations. In addition, he reminded them to take back with them photographs of the scene of the accident and of the vehicles involved in the collision. Subsequently, a verdict and judgment were rendered in the City's favor. London appealed, contending that the judge unduly emphasized the photographs and therefore distorted the presentation of the case to the jury. In affirming the judgment, the court merely stated:

"While there is some repetition of the fact that the jury had pictures to look at, we think that on the whole, the case was fairly before them."

Also see Fredericks v. American Export Lines, 227 F.2d 450 (2d Cir.), cert. den. 350 U.S. 989, 76 S.Ct. 475, 100 L.ed. 855 (1955); Polara v. Trans World Airlines, 284 F.2d 34, (2d Cir. 1960); Mutual Service Cas. Ins. Co. v. Overholser, 58 NW 2d 268, (Minn. 1953); Warmuth v. Greenberg, 49 So. 2d 793, (Fla. 1951); Gunderson v. All America Commerce Corp., 275 App. Div. 572, 90 NYS 2d 3 (1949).

It should be noted that counsel for Appellant conceded that the jury deliberated late into the night of September 8. (Supp. Tr. 7). Inasmuch as Supplemental Instruction No. 1 was submitted to the jury at about 4:30 P.M. of that same day, (R. 339), it seems exceedingly doubtful that the jury was unduly swayed by the instruction. One would expect that the jury would have returned very soon after the submission of the instruction if they were in fact improperly swayed by its belated submission to them.

Finally, the method by which the instruction was given to the jury renders it doubly improbable that they were improperly swayed. The bailiff merely handed the instruction to the Jury Foreman without comment or explanation, (Tr. 380, 382), a mode of proceeding vir-

tually certain not to arouse undue attention.

Appellant wishes to argue on this appeal that Supplemental Instruction No. 1 did not properly state the law. (Br. 18). Also, he evidently wishes to argue that the instruction should not have been given because there was testimony which, if believed, would have rebutted the presumption. (Br. 20). However, it must be noted that Appellant did not object on either of these grounds in the trial court and has therefore waived such objection. Rule 51 F.R.C.P.; Palmer v. Hoffman, 318 U.S. 109, 119, 63 S.Ct. 477, 483, 87 L.ed. 645 (1942); Hargrave v. Wellman, 276 F.2d 948 (9th Cir. 1960). Appellant seeks to avoid this rule of law by asserting that he did not have sufficient time to phrase a proper objection. (Br. 15). Indeed, he asserts that he had "only a matter of seconds or at most minutes" before stating his objection to the instruction. (Br. 18). Appellant is seriously mistaken. The record shows that at about 3:50 P.M. the trial judge indicated that he might submit Appellee's Additional Proposed Instruction No. 27. (R. 339; Tr. 374-376). Then, at 4:25 P.M., the trial judge announced his decision to submit the instruction. (R. 339). Moreover, Appellant did not ask for any additional time to consider the instruction.

In any event, the record indicates that counsel for Appellant certified that he received Appellee's

Additional Proposed Instruction No. 27, upon which Supplemental Instruction No. 1 was based, on September 7 - one day prior to the time that it became necessary for Appellant to make his objection to the instruction.

Additionally, it must be noted that counsel for Appellant did not allege the present grounds for objection in either his "Statement of Points Upon Which Appellant Intends To Rely", (R.433-434) or in his "Specification of Errors" in his present brief. (Br. 9-10). Therefore, for these additional reasons Appellant ought not to be allowed to urge the present grounds for objection. Rule 18(2)(d) United States Courts of Appeals Rules, Ninth Circuit; Lee v. United States, 238 F.2d 341 (9th Cir. 1956).

In any event, however, there is no doubt whatsoever that Supplemental Instruction No. 1 properly stated the law and was properly submitted even though there was testimony which, if believed by the jury, would have rebutted the presumption.

The jury was properly instructed elsewhere as to the effect to be given to a presumption where contrary evidence is introduced:

A presumption is a conclusion which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect until overcome or outweighed by evidence to the contrary;

but unless so outweighed the jury are bound to find in accordance with the presumption. (R. 371).

This was a stock instruction taken from Mathes and Devitt, Federal Jury Practice and Instructions, (1st ed. 1965) §71.04, and is supported by numerous cases cited at the end of that section. It was not objected to by counsel for the Appellant.

Professor McCormick very clearly sets forth the law on this matter:

Let us suppose that a party proves due mailing of a letter, properly addressed, bearing a return address, and that it was never returned. Not only does this create a technical legal presumption, conclusive if contrary evidence is not adduced, that the letter was duly delivered to the addressee, but if the evidence is believed, it creates a probability, which measured by experience makes the odds overwhelming in favor of due delivery... But suppose this is not all we know. Suppose the addressee takes the stand and testifies unequivocally that he did not receive the letter... The testimony of the addressee "that he did not receive the letter is undisputed, we assume, by any direct testimony of anyone who asserts that he did receive it. Is it for this reason to be accepted as conclusive by all reasonable men, and must the judge accordingly direct the jury to find, contrary to the presumption, that the letter was not received? Despite some early cases when mails were less regular, and others where the balancing factors were not recognized, the answer today is clear. The issue is ordinarily for the jury. It seems that the need here

is imperative for an instruction upon the presumption... (McCormick on Evidence, (1st ed. 1954) §311, p. 650. (emphasis added)).

Several pages later, Professor McCormick states convincing reasons why the instruction on the presumption ought to be given even where testimony has been introduced which, if believed by the jury, would rebut the presumption:

... as to some presumptions, the custom of informing the jury in some fashion of the rule of presumption is well-nigh universal ... (T)he presumption of receipt of a letter from due mailing (is an) instance ... (T)he digests give abundant evidence of the widespread and unquestioning acceptance of the practice of informing the jury of the presumption despite the fact that countervailing evidence has been adduced upon the disputed inference.

It seems to me that the practice is wise and indeed almost necessary ...

(Instructions on presumptions) can give the jury substantial aid in avoiding mistakes in difficult cases. A presumption is a rule which has the effect that from certain circumstances a certain inference may be drawn. Persons unaccustomed to weighing evidence and particularly persons of limited intelligence are notoriously suspicious of circumstantial inferences. Such persons, on the other hand are prone to be overcredulous of direct testimony. If a party having the burden of persuasion, then, must rest upon circumstantial evidence to prove an issuable fact, there is danger that the jury reading the burden of proof charge will mistakenly suppose that the circumstantial inference, especially if countered

by direct testimony, could not be
"a preponderance of the evidence."
McCormick on Evidence, (1st ed. 1954),
§316, pp. 667 to 668.

Indeed, Appellant has cited no authority con-
trary to the well-respected views of Professor McCormick.
In fact, a portion of the material which Appellant has
cited from Wigmore's treatise is in accord with Professor
McCormick's views and hence in Appellee's favor:

(a) Where the issue is whether the
letter was received by the addressee,
it often occurs that the addressee's
testimony denies the arrival and
receipt. This being some evidence
to the negative of the issue, the
binding effect of the presumption
ends, and the issue goes to the jury
to decide upon the weight of the evi-
dence. On this point a court is
occasionally found holding that
the uncontradicted testimony of
the addressee denying the receipt
"entirely negatives the presumption,"
and that therefore the jury cannot
find for the receipt; which is, of
course, unsound because the jury
may not believe the denial, as
other courts have pointed out.
(Wigmore on Evidence, 3d ed. 1940),
§2519(B); (emphases added).

A clear implication from the above statements of Wigmore
is that the instruction on the presumption ought to be
given even where there is testimony denying receipt. It
is only the binding effect of the presumption that is de-
stroyed when contrary testimony is introduced. But since
the jury may disbelieve that testimony, the presumption
may still be called into operation, and therefore the

instruction ought to be given.

The recent Alaska case of Hartsfield v. Carolina Cas. Ins. Co., 411 P.2d 396 (Alaska 1966) is not contrary to the views of Professor McCormick. In that case, the court stated:

"The denial of receipt rebuts a prima facie case of mailing and creates an issue of fact for resolution by the trier of fact." (411 P.2d at 400).

It is clear that the Alaska Supreme Court used the term "prima facie case" in the manner in which Wigmore defined it:

...the term is applied to the stage of the case ... where the proponent, having the burden of proving the issue (i.e., the risk of non-persuasion of the jury), has not only removed by sufficient evidence to get past the judge to the jury, but has gone further, and, either by means of a presumption or by a general mass of strong evidence, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence. Wigmore on Evidence (3d ed. 1940), §2494, p. 293.

Thus, as is indeed apparent from the facts of the case, the statement of the Alaska Supreme Court means only that a denial of receipt prevents the proponent of the presumption from obtaining summary judgment. However, the opinion in no way implies that an instruction on the presumption should not be given where there is testimony of

non-receipt in the case.

The only other authority that Appellant cites as supporting his position is the case of Keeling v. Travelers Ins. Co., 67 P.2d 944 (Okla. 1937), and that case does not in fact support Appellant's position. The case did not hold that no instruction on the presumption should have been given. It held only that a verdict should not have been directed, and that the issue should have gone to the jury. Indeed, one statement of the court strongly implies that the instruction on the presumption should be given since it would be advantageous to both parties;

That presumption arising from the known regularity of the United States mail service is as available for the supposed receiver of a letter as for the alleged sender thereof. If proof that a properly addressed and stamped letter was posted gives rise to a presumption that it was received in due course..., so proof that no letter was received warrants a finding that it was never posted. If this plaintiff's testimony denying the receipt of the letter was believed, the jury would be warranted in going further and finding that the letter was not posted. (67 P.2d at 945).

Additionally, it must be noted that Supplemental Instruction No. 1 was not as strong as the law would allow. The instruction stated only that proof of mailing gives rise to the presumption that the letter reached the address to which it was mailed, (R. 391), but, as Professor McCormick and Wigmore have pointed out, proof of mailing raises

the presumption that the letter was received by the addressee. Hagner v. United States, 285 U.S. 427, 52 S.Ct. 417, 76 L.ed 861 (1931); Rosenthal v. Walker, 111 U.S. 185, 4 S.Ct. 382, 28 L.ed 395 (1883); McCormick on Evidence (1st ed. 1954), §311, p. 650; Wigmore on Evidence (3d ed. 1940), §2519(B).

Finally, it must be noted that even if the instruction was improperly given because it was belatedly submitted or because it improperly stated the law, the error was a harmless one. The jury found in Appellee's favor on two separate and independent grounds. It found that the insurance policy was cancelled, and on this issue the contested presumption was material. (See Interrogatory No. 3, R. 394). But it also found that if there were any defects in the method of cancellation, they were waived by the Appellant, (See Interrogatory No. 4, R. 394), and on this issue, the contested presumption was not material. Such being the case, the fact that there was error in the instruction pertaining to the issue of whether or not there was a proper cancellation does not require a reversal, because the jury found separately and independently of that issue that any defects in the cancellation were waived. Holloway v. Dunham, 170 U.S. 515, 18 S.Ct. 784, 42 L.ed 1165 (1898) is squarely in point. In that case, plaintiff brought suit to recover the value of goods sold and delivered by plaintiff to defendant.

The action was brought in the Territory of Oklahoma. Defendant, at the time of commencement of the suit was a resident of Texas. Plaintiff therefore commenced attachment proceedings against defendant on the ground that he was at that time a non-resident of the Territory of Oklahoma. A second alleged basis for the attachment proceedings was plaintiff's contention that defendant was about to fraudulently convey the property sought to be recovered. The trial judge ordered the jury to return a general verdict, but also submitted the following interrogatories to the jury:

"1) Was [defendant] ... about to sell and convey or otherwise dispose of his property subject to execution, with intent to cheat, hinder, and delay his creditors?

2) Was [defendant] ... a non-resident of Oklahoma Territory?"

The jury, in returning a verdict for plaintiff answered both interrogatories in the affirmative. On appeal to the United States Supreme Court, defendant contended that the trial judge's instruction as to what constituted a non-resident was in error. In affirming the judgment, the Court reasoned:

...we think it is not material now to inquire as to the correctness of the charge of the court in relation to the question of defendant's non-residence. If he were a non-resident when the attachment was issued it could be sustained on that ground. But it could also be sustained if at

the time it was issued the defendant was about to sell and convey or otherwise dispose of his property subject to execution, with the intent to cheat, hinder, and delay his creditors. So there were two facts entirely separate and distinct from each other, either of which being found to exist would justify and support the attachment.

The jury having found that the defendant at the time the attachment was issued did intend to convey his property, and thus cheat his creditors, that fact is conclusive upon this court, and, being in itself sufficient to uphold the attachment, without reference to the other fact of the defendant's non-residence, a complete answer is furnished to any alleged error in the instruction of the court as to what constitutes a non-resident.

Whether the court erred in charging the law in relation to non-residence is therefore immaterial. There is no such connection between the two grounds upon either of which the attachment could be supported, that an error in the charge of the court in regard to one can be said to affect the other, and thus furnish cause for a new trial. (170 U.S. at 618).

Also see Odekirk v. Sears Roebuck & Co, 274 F.2d 441, (7th Cir.) cert. den. 362 U.S. 974, 80 S.Ct. 1060, 4 L.ed. 2d 1011 (1960); United States v. Six Dozen Bottles, etc., 158 F.2d 667 (7th Cir. 1947); Larson v. General Motors Corp., 148 F.2d 319 (2d.Cir.), cert. den. 326 U.S. 745, 66 S.Ct. 34, 90 L.ed 445 (1945).

In conclusion, the instruction properly stated the law and was properly submitted to the jury, even

though there was testimony which, if believed by the jury, would have rebutted the presumption. But even if there was error, it was harmless error because of the separate and independent additional finding of the jury which was in itself sufficient to support the verdict.

Another point which Appellant apparently urges under his Specification of Error No. 1 is that the trial judge committed error by not informing counsel of his proposed action upon the parties' requests for instructions prior to the time that the jury retired. (Br. 16-17). However, the record clearly shows that the trial judge did inform both counsel of his proposed action upon their requests for instructions (R. 338, Tr. 371). Moreover as several cases have pointed out, the purpose of Rule 51 in requiring the judge to inform counsel of his proposed action on instructions is to enable counsel to know the guiding principles under which their final arguments should be made. See e.g. Terminal R. Ass'n. of St. Louis v. Staengel, 122 F.2d 271, (8th Cir.), cert. den. 314 U.S. 680, 62 S.Ct. 181, 86 L.ed. 544 (1941); Dallas Ry. & Terminal Co. v. Sullivan, 108 F.2d 581 (5th Cir. 1940). Counsel for Appellant has failed to indicate how his final argument was prejudicially affected by the Court's alleged failure to inform him what instructions would be given. In any event, the case law indicates that the trial court has discretion in

deciding whether to submit an additional instruction to the jury, even though counsel have not been informed of the instruction prior to the closing arguments. See Miscione v. Penn. R. Co., 284 F.2d 428, (2d Cir. 1960)

Moreover, Appellant, by stipulating that objections to the court's instructions be taken after the jury retired (Tr. 372, R. 338), ought to be held to be estopped from asserting this contention, inasmuch as the only reason for taking objections prior to the jury's retiring is to enable the trial judge to cure omissions or other defects in his instructions before the parties' final arguments. By stipulating otherwise, Appellant has prevented the court from curing the very defect which Appellant now wishes to urge as error.

Appellant's final argument under his first Specification of Error is that the trial judge erred in accepting for consideration Appellee's Additional Proposed Instruction No. 27, because it was not timely offered. (Br 15). Moreover, Appellant seems to imply that Appellee did not offer its Additional Proposed Instruction until after the jury had retired. (Br. 16). Again, Appellant is seriously mistaken. The record clearly shows that Appellee offered the instruction in question for the trial judge's consideration prior to the jury's retiring on September 8. (Tr. 375, 376, 379). Moreover counsel for Appellant also submitted additional proposed instructions

at about the same time, and therefore apparently acquiesced in the court's acceptance of proposed instructions submitted after the initial deadline date of September 6, formerly set by the trial judge. (Tr. 376). In any event, the trial judge expressly waived the deadline date for proposal of instructions and allowed them to be submitted on September 8. (Tr. 376). Furthermore, the trial judge expressly stated that he did not feel that there was any attempt made on the part of counsel for defendant to slip the instruction in question in tardily in order that it might be given undue emphasis. (Tr. 382).

In such circumstances, the trial judge did not err in accepting Appellee's Additional Proposed Instruction No. 1 for consideration subsequent to the initially ordered deadline and prior to the jury's retiring. In fact, the judge probably would have committed reversible error if he had refused to accept the proposed instruction for consideration. Wilson v. Southern Farm Bureau, 275 F.2d 819, (5th Cir.), cert. den. 364 U.S. 817, 81 S.Ct. 49, 5 L.ed. 2d 48 (1960).

In conclusion, neither the failure of the trial judge to inform counsel of his action on their proposed instructions nor his failure to refuse to accept for consideration Appellee's Additional Proposed Instruction No. 27, was, under the circumstances, reversible error.

II

THE COURT DID NOT COMMIT REVERSIBLE ERROR BY SUBMITTING TO THE JURY THE SPECIAL INTERROGATORY CONCERNING NOVATION

Appellant contends that the trial court unduly confused the jury and therefore committed reversible error by submitting to the jury an interrogatory concerning the issue of novation where, the issue of novation having been removed from the case by the trial court, no instruction defining the term novation was given. (Br. 23). Appellant again offers very little argument or authority in support of his position, and at one point, Appellant inaccurately described the chain of events occurring during the trial. Appellant asserts that the jury was sent back to deliberate upon the interrogatories and then returned again for further instructions on the interrogatories. (Br. 23). The record will show that the jury did not return for further instruction after being sent back to answer the interrogatories. (Supp. Tr. 2).

Preliminarily, it must be noted that counsel for Appellant did not specifically object to the submission of the interrogatory in question. Rather, he objected only in a very general fashion to the giving of any interrogatories:

"I would object to the special verdict because I don't feel that there has been a showing as to why we should have this..." (Tr. 378-379)

The failure of counsel for Appellant to object specifically to the submission of the novation interrogatory was not due to a lack of knowledge by him of the text of the special interrogatories. This is conclusively demonstrated by the fact that counsel for Appellant objected specifically to the text of Interrogatory No. 4 concerning waiver of defects in cancellation. (Tr. 379). Under such circumstances, Appellant should be held to have waived the objection which he now is seeking to urge. Since counsel for Appellant gave the trial judge no opportunity to cure the alleged defect to Appellant's satisfaction, Appellant ought not now to be allowed to object that the proceedings were not satisfactory to him.

Martin v. United Fruit Co., 272 F.2d 347, (2d Cir. 1959); Palmer v. Hoffman, 318 U.S. 109, 119, 63 S.Ct. 477, 87 L.ed. 645 (1942); Hargrave v. Wellman, 276 F.2d 948, (9th Cir. 1960).

In any event, Appellee can not conceive how the confusion of the jury, if indeed any there was, could have prejudiced Appellant. It is to be noted that once proper interrogatories were submitted to the jury, the jury was able to answer them in one hour and eight minutes. (R. 340). Moreover, the jury answered the interrogatories in a fashion completely consistent with its General Verdict. (R. 392-394). Appellee could conceive that the jury might be deemed to have been prejudicially confused

if the jury's answers to the interrogatories had been inconsistent with its General Verdict. But where those answers are completely consistent with the General Verdict, Appellee cannot conceive that the jury could properly be said to have been prejudicially confused.

Substantial case law exists holding that similar errors are not prejudicially erroneous. In Diniere v. United States Lines Co., 288 F.2d 595 (2d Cir. 1961), a seaman brought suit for personal injuries allegedly sustained aboard a vessel due to unseaworthiness and to negligence of the owner. During the course of the proceedings, the trial judge submitted eight interrogatories to the jury, one of which was seriously ambiguous and confusing to the jury. After several hours of deliberation and the receipt of a number of communications from the jury seeking explanation of the ambiguous interrogatory, the trial judge withdrew all of the interrogatories, and told the jury to disregard them and bring in only a general verdict in the usual form. After further deliberations, the jury brought in a verdict in favor of the seaman, and judgment was entered thereon. The shipowner appealed, urging that the court erred in withdrawing the interrogatories. In affirming the judgment, the Court of Appeals per Medina, C.J. stated:

There was an inherent ambiguity in question one, and it is plain enough

that the explanation failed to remove the ambiguity. Under these circumstances it was not an abuse of discretion to withdraw the questions and give the jury an opportunity to agree upon a general verdict. As F. R. Civ. P., Rule 49(b) authorizes the submission of interrogatories to assist the jury in arriving at a verdict, it is reasonable and quite consistent with the broad powers of a federal trial judge to infer that in a proper case the interrogatories may be withdrawn. It was a matter of judgment whether to attempt some further elucidation of the question, or to declare a mistrial, or to withdraw all the questions and authorize a general verdict. We cannot say the decision made here under all the circumstances of the case was wrong...

...[T]he interrogatory causing all the difficulty here was unclear and ambiguous. The withdrawal of all the questions was for the purpose of eliminating the confusion caused by the formulation of an improper question ... Under the circumstances it was, we think, good judgment to withdraw all of the questions. Certainly we cannot say to do so was an abuse of discretion. (288 F.2d at 599-600).

In United States v. Six Dozen Bottles, Etc., 158 F.2d 667 (7th Cir. 1947), a libel was brought by the United States for the condemnation of a number of bottles of an article called "Dr. Peter's Kuriko" on the ground that the bottles were misbranded when in interstate commerce. At the end of the trial, the trial judge instructed the jury and submitted a number of interrogatories, one of which was No. 4. There was no charge in the information to which Interrogatory No. 4 was responsive; the

court submitted the interrogatory purely for its own enlightenment. The Appellate Court held that it was error for the trial court to submit the interrogatory but that such error was not prejudicial. It based its decision on the ground that the jury's answer to the erroneous interrogatory neither added to nor detracted from its answer to another properly submitted interrogatory which formed the basis for the jury's verdict, and that the jury's answer to the erroneously submitted interrogatory bore no relation to its answer to the properly submitted interrogatory.

It is submitted that the jury in the instant case was apt to be less confused than was the jury in the Diniero case (supra). This is emphasized by the fact that the jury never did answer the novation interrogatory. Furthermore, as in the Six Dozen Bottles case (supra), the interrogatory concerning novation was completely independent of the other properly submitted interrogatories. An answer to the interrogatory dealing with novation would not have affected the jury's answers to other interrogatories in any manner whatsoever. For these reasons, Appellee urges that the above two cases are in point and that any error which the trial court might have committed by submitting the novation interrogatory was not prejudicial and therefore does not warrant a reversal.

III

THE COURT DID NOT COMMIT PREJUDICIAL
ERROR BY SUBMITTING INTERROGATORY NO.
4 PERTAINING TO WAIVER, SINCE THERE
WAS EVIDENCE OF WAIVER.

Appellant apparently wishes to urge on this appeal that Instruction No. 15 incorrectly stated the law. (Br. 27, 28-30). It must be noted that counsel for Appellant failed to include this as a ground for appeal in either his Motion for New Trial, (R. 407-408, 412), his "Statement of Points Upon Which Appellant Intends To Rely" (R. 433-435), or in his "Specifications of Errors" contained in his instant brief. (Br. 9-11). Furthermore, it is entirely unclear in Appellant's brief whether Appellant in fact wishes to argue this point. For these reasons, Appellant ought to be foreclosed from making this issue a contention on this appeal. United States Courts of Appeals Rules, Ninth Circuit, Rule 18(2)(d); Dower v. United Air Lines, 329 F.2d 684 (9th Cir. 1964); Greyhound Corp. v. Blakely, 262 F.2d 401 (9th Cir. 1958).

In any event, Instruction No. 15 correctly stated the law. There is no question that defects in a notice of cancellation can be waived by the insured or by one of his agents:

Since policy provisions, requiring notice of cancellation to be given to the insured a stipulated period of time before the insurance is terminated, are for the benefit of

the insured, they may be waived by him. Such waiver can be effected either by the insured personally or through his authorized agents. [Appelman, Insurance Law and Practice, (1st ed. 1942), §4183, pp. 714-715].

In Finley v. New Brunswick Fire Ins. Co., 193 Fed. 195 (E. D. Wash. 1911) defendant insurance company issued a fire insurance policy on plaintiff's property through its agent who for many years had represented plaintiff in looking after his insurance business in a limited way. On August 16, defendant requested its agent to cancel the policy on plaintiff's property. This request was received by defendant's agent on the morning of August 20. Later that same day, defendant's agent, assuming to act for plaintiff, took out a replacement policy with another company. On the following day, August 21, plaintiff's property was destroyed by fire. Two days later, defendant's agent rendered the replacement policy to plaintiff, informing him that they had been instructed to cancel the policy formerly issued by defendant. Plaintiff at no time received written notice of cancellation, and at first he refused to accept the replacement policy. Later, however, plaintiff did accept the replacement policy. Subsequently, he brought suit against defendant seeking to recover on the policy which had been cancelled. In addition, plaintiff brought a separate suit against the company which issued the replacement policy. The trial

judge ordered that judgment for defendant be entered. In the course of his opinion, the judge expressly declined to decide whether defendant's agent was also plaintiff's agent at the time he procured the replacement policy. The rationale of his decision was as follows:

The [replacement] policy was taken out by [defendant's agent], assuming to act for the plaintiff, for the purpose of replacing the policy in suit, which they had been instructed to take up and return, and not for the purpose of increasing the amount of insurance on the property. This object or purpose was made known to plaintiff before he accepted and brought suit on the [replacement] policy ... [A]ssuming for the purpose of this case that [defendant's agent] had no authority to cancel the policy in suit, or to substitute another policy in its place, yet, when plaintiff was informed as to what had taken place, it was incumbent on him to elect which policy he would claim under. If [defendant's agent] acted without authority [from plaintiff], he might disavow their acts, and claim under [the policy of defendant company], or he might ratify the substitution which his agents had made in his behalf, and without authority; but manifestly he could not do both. He could not claim the benefit arising from the act of his agents in taking out a policy, and at the same time repudiate the object and purpose for which the new policy was obtained. (193 Fed. at 197).

In complete accord with the Finley case is the recent Ninth Circuit case of Pagliero v. Merchants Fire Insurance Corp. of N. Y., 169 F.2d 375 (9th Cir. 1948). In that case, plaintiff's property, prior to April 10, 1946, was insured under a policy issued by defendant

insurance company, such policy containing the usual five days notice of cancellation clause. On April 10, 1946, defendant wrote to its agent requesting it to cancel the policy. Subsequently, defendant's agent procured from another company another insurance policy covering plaintiff's property. The agent then notified defendant insurance company that the policy had been cancelled. However, the agent failed to notify plaintiff of the cancellation and substitution of the other policy until several days after fire had damaged plaintiff's property. When informed of the action taken by its agent, plaintiff asserted rights under both policies. The company which had issued the replacement policy paid a portion of the loss, but defendant company refused to pay and plaintiff brought suit. The jury returned a verdict for defendant, and plaintiff appealed. In affirming the judgment, the Court of Appeals expressly refused to decide whether defendant's agent had authority from plaintiff to cause cancellation of plaintiff's policy with defendant and procure a substitute policy. It held that independent of that question, ratification clearly appeared, and in so holding, the Court placed controlling reliance upon Finley v. Brunswick Fire Insurance Co., (supra p. 48). The Appellant's attempts to distinguish the Finley case were to no avail:

...[A]ppellants ... attempt to distinguish [the Finley case] from the case at bar on the ground that the authority granted the agent in the Finley case was much broader than that granted to [defendant's agent] by Appellants. Frankly, we are unable to understand in what manner the degree of power possessed by the broker could have influenced the decision of the court because it was assumed that no authority existed and the decision was bottomed on ratification. The same may also be said of appellant's second attempt to distinguish the Finley case by pointing out that the agent in that case was acting as broker for one of the parties and agent of the other. In either situation the benefit from the act of the agent arising from the taking out of the new policy could not be claimed and at the same time the object and purpose of the agent in securing the new policy, viz., replacement of the old policy, repudiated. (169 F.2d at 374-375).

Although the above-discussed cases are deeply involved with problems of ratification, it is crucial to note that deciding only the question of ratification would not have been sufficient in and of itself for the courts to have decided the cases. Rather, in both the Finley case and the Pagliero case, the result would have been the same had the policy holder purchased the substitute policy himself, instead of another's agent doing that for him. Thus, those two cases implicitly hold that purchase of or acquiescence in the purchase of a substitute policy coupled with the bringing of a claim under the replacement policy constitutes a waiver of defects in the cancellation of the former policy that the sub-

stitute policy replaced.

Appellant also contends that there was no evidence that Appellant waived any defects in the method of cancellation. (Br. 28). Appellant is clearly incorrect. Appellant admitted that Bailey E. Bell advised him in both a letter and a telephone call that he (Bell) had purchased a new or substitute policy in the amount of \$15,000.00. (Tr. 335), and that he (Bell) would look to Appellant for payment of premiums on the substitute policy. (Tr. 352). Inasmuch as Appellant did not testify that he objected to Bell's demand that Appellant pay the premiums, it is clear that Appellant acquiesced in the demand. (Tr. 352). Moreover, at one point in his pleadings, Appellant admitted that Bailey E. Bell was his agent in procuring the substituted policy. (R. 130). Appellant admitted that he felt that the substituted policy was sufficient (Tr. 75, 353), and that he felt that the policy issued by Appellee was replaced by the policy which Bailey E. Bell had purchased. (Tr. 353). At one point, Appellant's admissions in his deposition made this matter quite clear:

Q. I mean between January 7th and January 16th, did you make any inquiries, contact any insurance agents, in any way seek to either get a policy, a new policy or make sure that this was reinstated or anything of that nature?

A. Bailey's was in effect. (Tr. 354).

Furthermore, Appellant brought suit against the Glens Falls Insurance Company and the Kansas City Fire and Marine Insurance Company, the joint issuers of the substitute policy, seeking to recover under the substitute policy. (R. 127).

In view of the foregoing evidence that Appellant acquiesced in the purchase of a replacement policy and actually brought a claim against the companies that issued the replacement policy, it is clear that there was sufficient evidence to warrant the submission of Instruction No. 15 and Interrogatory No. 5.

In any event, even if Instruction No. 15 erroneously stated the law, a reversal is not warranted. The jury found in Appellee's favor on two separate and independent grounds. It found that if there were any defects in the method of cancellation, they were waived by Appellant, (see Interrogatory No. 4, R. 394), and on this issue the instruction in question was material. But it also found that the insurance policy was properly cancelled, (see Interrogatory No. 3, R. 394), and on this issue the instruction in question was not relevant. [It is important to note that the jury did not find that there were in fact any defects in cancellation; it merely found that on the assumption that there were defects, they were waived. (R. 394)]. Such being the case, the fact that there was error in the instruction pertaining to the issue of

whether any defects in cancellation, assuming there were such defects, were waived does not warrant a reversal, because the jury found separately and independently of that issue that there was a proper cancellation. See analysis of Holloway v. Dunham, on p. 36-38 supra.

Appellant next argues that the jury's answers to interrogatories No. 4 and No. 5 were inconsistent. The text of the interrogatories and the jury's answers as follows:

"Interrogatory No. 4. Did the defendant insurance company, through its agent, cancel the insurance policy?

Answer to Interrogatory NO. 4

Yes
(Yes or No)

Interrogatory No. 5. If there were any defects in the method of cancellation, did plaintiff waive such defects?

Answer to Interrogatory No. 5

Yes
(Yes or No)
(R. 394)

Appellant is clearly mistaken. The jury, by answering No. 5 in the affirmative did not assert that there were in fact any defects. It merely asserted that, even if one were to assume that there were defects, then they were waived.

Further, the court has a strong duty to take a view of the case which makes the jury's answers to

special interrogatories consistent. It is the strong duty of the courts to read answers to interrogatories as being consistent if such a reading is possible. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd., 369 U.S. 355, 82 S.Ct. 780, 7 L.ed. 2d 798, rehearing denied 369 U.S. 882, 82 S.Ct. 1137, 8 L.ed. 2d 284, motion denied 371 U.S. 803, 83 S.Ct. 15, 9 L.ed. 2d 51 (1962); Gallick v. B. & O. Ry. Co., 372 U.S. 108, 83 S.Ct. 659, 9 L.ed. 2d 618 (1963). It is submitted that the court should construe the answers to the interrogatories in the manner heretofore suggested and thereby find them to be consistent.

Lastly, Appellant suggests that Appellee was deficient in not pleading waiver as an affirmative defense. (Br. 28). First of all, it should be noted that the issue of whether or not any possible defects in the notice of cancellation were waived was impliedly pleaded by Appellee when it pleaded its affirmative defense of cancellation. (Ree R. 180). The issue was also implicitly included in the court's generalized statement of the cancellation issue at page 7 of the Pretrial Order in the following words, "Whether or not the Central Mutual Insurance Company policy was cancelled effective January 4, 1965;" (R. 222). There was no other way for Appellee to have responsively pleaded the waiver issue, since Appellee's complaint did not allege defects in the notice of cancellation. (R. 307, 125-132).

Therefore, in view of the rule that pleadings are to be most strongly construed in favor of the pleader, the issue of waiver of defects in the notice of cancellation ought to be held to have been included in the affirmative defense of cancellation that was pleaded by Appellee. Metropolitan Life Ins. Co. v. Fugate, 313 F.2d 788 (5th Cir. 1963).

Appellee objects to Appellant's raising of this point at this, the latest of possible times. At no previous time whatsoever has Appellant mentioned this omission, including the time at which the court instructed the jury on waiver. (Tr. 376-377). Appellant states that the question of waiver arose for the first time when proposed instructions were offered. (Br. 28). Again, Appellant is seriously mistaken. The record indicates that the question of waiver was raised in Appellee's Opening Argument. (Tr. 27).

Appellee again raised the issue of waiver of cancellation in a legal memorandum duly submitted to the trial court long prior to the trial. (R. 278-281). Furthermore, Appellee introduced, without objection by Appellant, a very substantial amount of evidence relating to the issue of waiver. This evidence related to the acquiescence of Appellant in the purchase of a replacement policy and his bringing of a claim against the company which issued the replacement policy. [See discussion supra

p.52-53;also see Tr. 75, 352, 353, 354].

Indeed, this is an instance where Rule 15(b) F.R. Civ. P. ought to be invoked:

"When issues not raised by the pleadings are tried by ... implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings..."

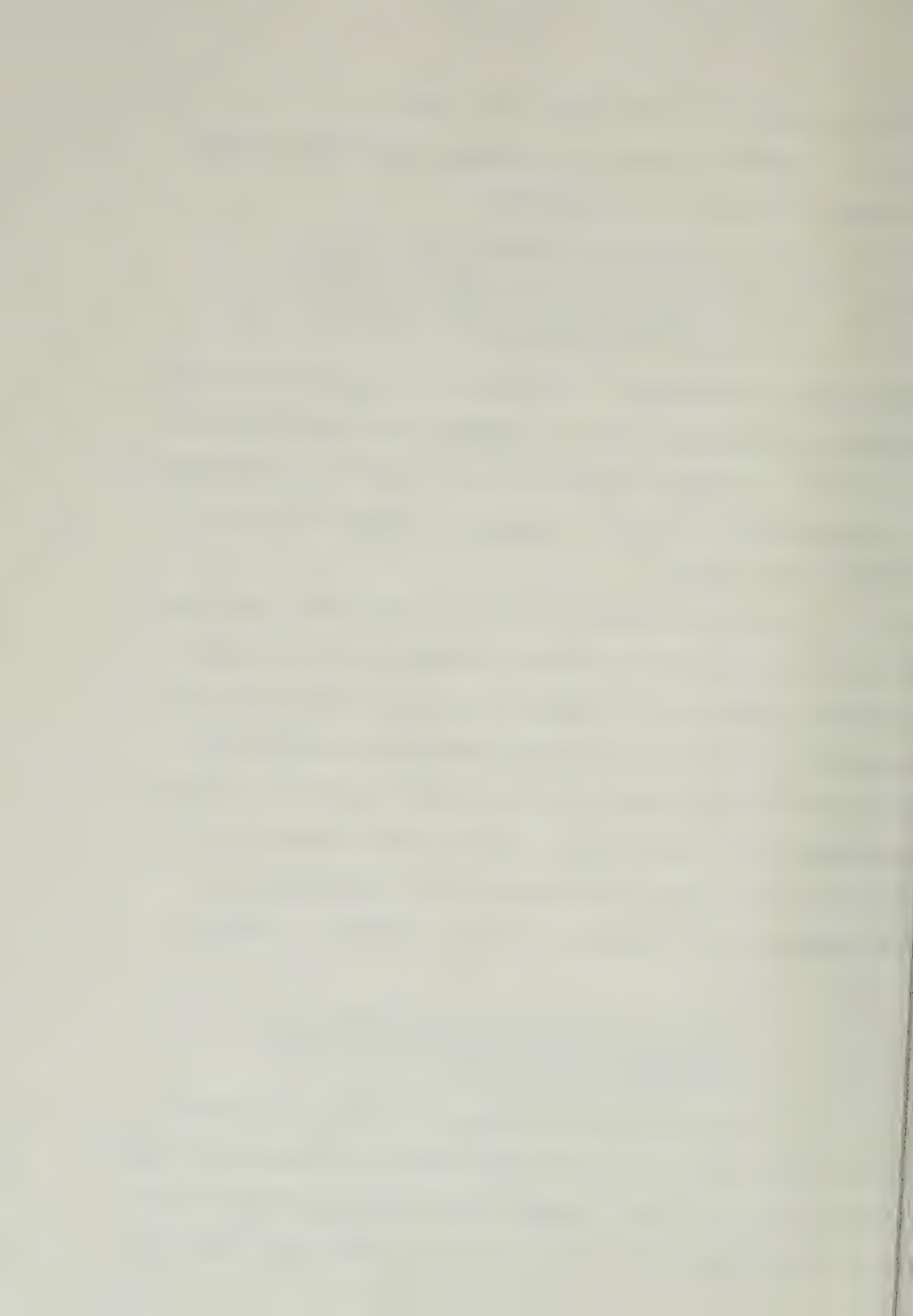
This rule is applicable to defenses as well as to claims. Metropolitan Life Ins. Co. v. Fugate, 313 F.2d 788 (5th Cir. 1963). Moreover, this rule has been held applicable to the defense of waiver. Pasquel v. Owen, 186 F. 2d 263 (8th Cir. 1950).

Appellee urges the court to hold that the issue of waiver was tried by implied consent of the parties inasmuch as Appellee's counsel failed to object on this ground to: (1) the statements concerning waiver that Appellee's counsel made in his opening argument; (2) the introduction of substantial evidence that there was a waiver of the notice of cancellation by Appellant; (3) the submission of an instruction on waiver to the jury.

IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SUBMITTING THE INTER- ROGATORIES TO THE JURY

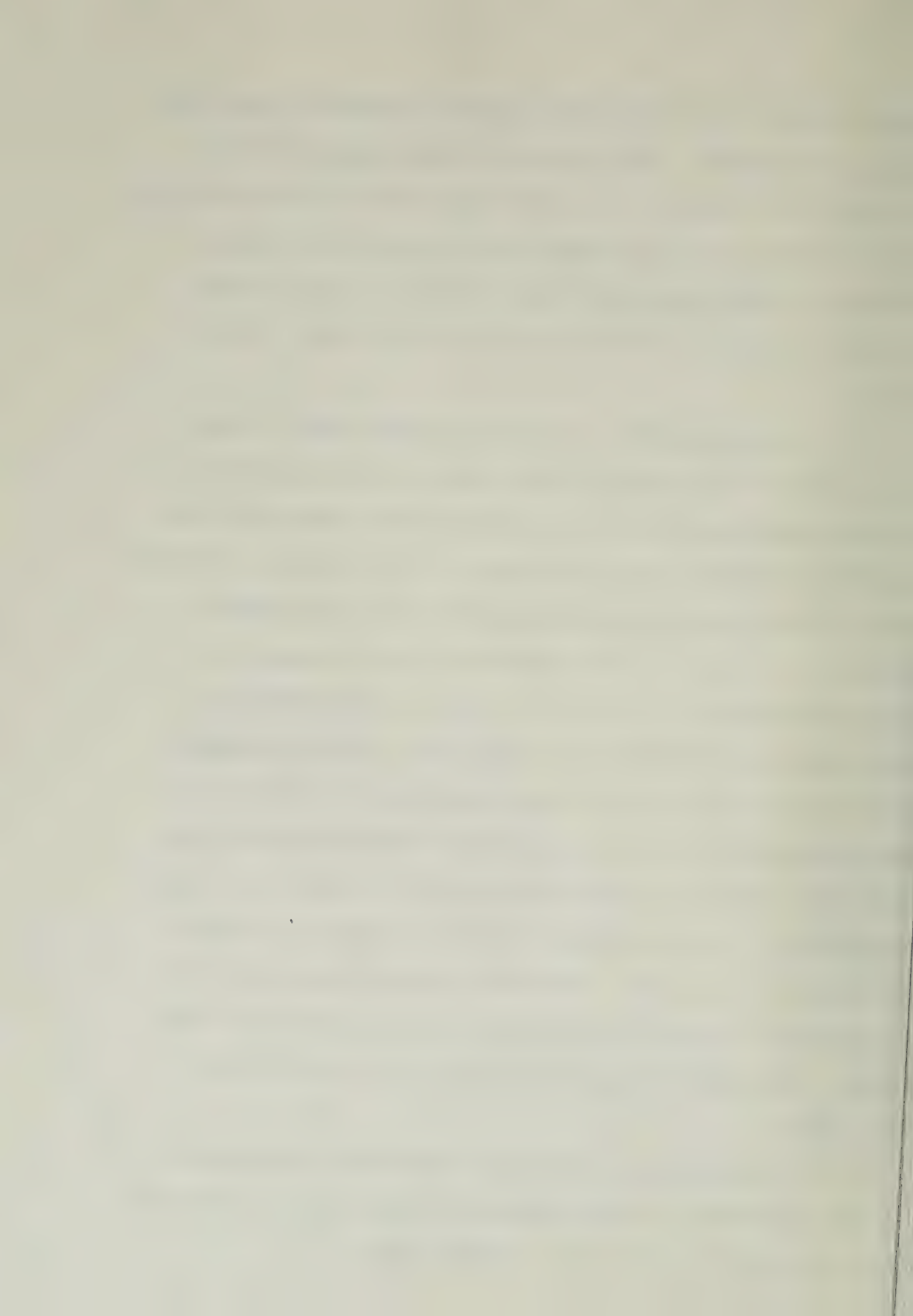
In Appellant's fourth Specification of Error, he contends that the trial court erred in submitting interrogatories to the jury because such interrogatories were misleading, confusing, and ambiguous. (Br. 31). Appellant



supports this contention with no case authority and virtually no argument. The thrust of what argument that he does offer seems to be that since the jury did not initially answer the interrogatories and since the jury's answers to Interrogatories No. 4 and No. 5 were inconsistent, then the jury must have been confused. (Br. 31).

Preliminarily, it must be noted that in the trial court, Appellant did not object to the submission of the interrogatories on the ground that they were misleading, confusing, and ambiguous. (Tr. 378-379). Furthermore, as has previously been pointed out, Appellant's failure to object on this ground was not a result of a lack of knowledge of the text of the interrogatories. (See previous discussion of this point, p. 42-43 supra). That counsel for Appellant had knowledge of the text of the interrogatories is conclusively demonstrated by the fact that he objected specifically to the text of Interrogatory No. 4 pertaining to waiver of defects in cancellation. (Tr. 379). Therefore, Appellant ought not be permitted to raise this ground for objection on this appeal. Martin v. United Fruit Co., 272 F.2d 347 (2d Cir. 1959).

Furthermore, Appellant waived any objections to the submission of the interrogatories when he insisted that the jury be ordered to answer them:



THE COURT. Counsel, with reference to the special verdict interrogatories that were submitted, is there any thinking on the part of either counsel that the interrogatories should be answered notwithstanding the verdict which has been returned?

MR. DELANEY: I will waive the necessity of filling out the special interrogatories, Your Honor.

MR. TALLMAN: No, Your Honor. The interrogatories were submitted and they should be answered. (Supp. Tr. 2).

In any event, Appellant's argument that the trial court committed prejudicial error by submitting the interrogatories must fail, for three reasons. First, since the jury's answers to Interrogatories No. 4 and No. 5 were not inconsistent, it does not appear that they were confused by those two interrogatories. (See full discussion of this point on p.54-55 supra). Second, Appellant has been completely unable to demonstrate that he has suffered any prejudice by the inadvertent submission of the interrogatory that pertained to novation, since the jury's answers to the interrogatories were very rapidly given after the jury was returned to the jury room specifically to answer the interrogatories and since the answers to the interrogatories were completely consistent with the general verdict. (See full discussion of this point on p.43-46 supra). Third, the trial judge has a very large discretion in determining whether to submit interrogatories to the jury, and Appellant has failed to

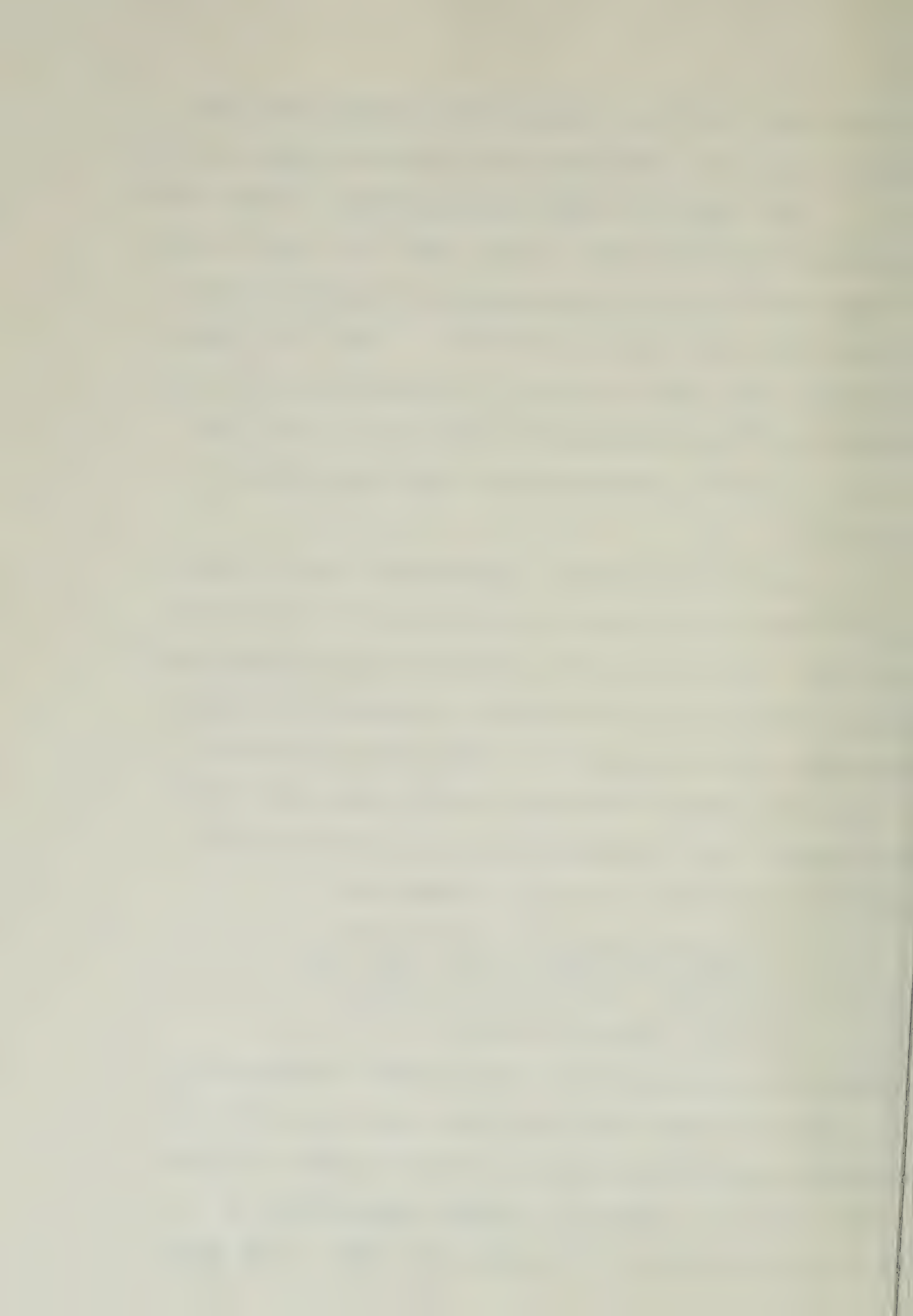
establish that the trial judge grossly abused this discretion. (see full discussion on this point infra, p.60-61).

The second argument which Appellant urges under this Specification of Error is that the trial court should not have submitted any interrogatories because no showing that they were necessary was made. (Br. 31). Appellant argues that this was merely "a simple suit for money damages based upon an insurance policy and a fire loss," and that therefore interrogatories were not necessary. (Br. 31).

Appellant entirely misconceives the law governing the question of whether interrogatories ought to be submitted. Rule 49(b) of the Federal Rules of Civil Procedure indicates that the question of whether to submit interrogatories to the jury is left to the discretion of the trial judge; furthermore, at no point does the rule suggest that any special showing is necessary in order for interrogatories to be submitted:

"The court may submit to the jury together with appropriate forms for a general verdict, written interrogatories..." [Rule 49(b) F. R. Civ. P., emphasis added]

Furthermore, the case law is replete with statements by the courts that the trial judge has wide discretion in determining whether and in what form to submit interrogatories. See e.g. Diniero v. United States Lines Co., 288 F.2d 595 (2d Cir. 1961); Texas Pac. Ry. v. Griffith,



265 F.2d 489 (5th Cir. 1959); Smith v. Welch, 189 F.2d 832 (10th Cir. 1951); DeEuginio v. Allis-Chalmers Mfg. Co., 210 F.2d 409 (3rd Cir. 1954). Professor Moore seems to be in accord when he states, referring to Rule 49(a):

...The court has complete discretion as to whether a special or a general verdict is to be returned. As with other discretionary acts, this should not be reviewable, except perhaps for gross abuse, which could rarely be shown. (5 Moore, Federal Practice, §49.03).

In view of the fact that the court adequately instructed the jury on the interrogatories (See Appellant's admission on p. 31 of his Brief) it is submitted that the trial court cannot reasonably be said to have abused its discretion in submitting such interrogatories.

V

CONCLUSION

Appellee contends that the trial court committed no errors, and therefore respectfully requests that the judgment of the trial court be affirmed.

Respectfully submitted in Anchorage, Alaska,
this 25th day of August, 1967.

DELANEY, WILES, MOORE & HAYES
Attorneys for Appellee

By James J. Delaney Jr.
James J. Delaney Jr.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DELANEY, WILES, MOORE & HAYES
Attorneys for Appellee
Central Mutual Insurance Company

By James J. Delaney, Jr.
James J. Delaney, Jr.

NO. 21686
NO. 21686-A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PEREA ROMERO and RONALD EUGENE TICKLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANTS' BRIEF

SIMON, SHERIDAN, MURPHY,
THORNTON & MEDVENE

625 South Kingsley Drive
Los Angeles, California

Attorneys for Appellants.

OCT 18 1967

FILED

OCT 13 1967

WM. B. LUCK, CLERK

NO. 21686
NO. 21686-A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PEREA ROMERO and RONALD EUGENE TICKLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANTS' BRIEF

SIMON, SHERIDAN, MURPHY,
THORNTON & MEDVENE

625 South Kingsley Drive
Los Angeles, California

Attorneys for Appellants.

TOPICAL INDEX

	<u>Page</u>
I	
Jurisdiction	1.
II	
Statement of the Case	2.
III	
Statement of Facts	5.
A. Preliminary Statement . . .	5.
B. Over-all Chronology	6.
IV	
Specification of Errors	9.
A. Errors as to Romero	9.
B. Errors as to Tickle	10.
V	
Summary of the Argument	11.
VI	
Argument	12.
A. Romero's arrest without a warrant lacked probable cause and is an illegal arrest	12.
B. Romero's statements at the time of his arrest are not	

admissible into evidence
as his arrest was illegal,
the statements were not
voluntary, he was not
properly warned of his
constitutional rights,
and the statements were
obtained during a period
of "unnecessary delay" . . . 26.

1. Preliminary

Statement 26.

2. Romero's arrest,

warning and

statement 26.

3. Securing the search

warrant 28.

4. Romero's arrest was

illegal; therefore,

this statement is not

useable by the

government 29.

5. Romero's statement

should be suppressed

as it was not

voluntary 30.

6. It is conceded that Romero
was given an inadequate
constitutional warning,
and thus Romero's
statement is
excludable 30.
7. Romero's statement is
excludable because it
was obtained during a
period of unnecessary
delay under Rule 5(a)
Federal Rules of
Criminal Procedure . . . 31.
- C. There is insufficient evidence
to support a conviction of
Romero on count one of the
indictment 33.
- D. The search warrant is legally
invalid as it does not set
forth probable cause; it is
also invalid as it uses as
part of its probable cause
illegally obtained statements
from Romero 38.
1. Romero has standing

- to contest the
validity of the search
warrant and the search
of Tickle's home 39.
2. Romero's statement in
the affidavit for the
search warrant renders
the search warrant
invalid 39.
3. The search warrant is
insufficient on its
face as it does not
establish probable
cause 41.
- E. Romero's statements and
actions at Tickle's home
during the search of Tickle's
home are inadmissible as
evidence as: they were
obtained from him after an
arrest without a warrant
and without probable cause;
they were involuntary; they
were obtained without a proper
prior constitutional warning;

and they were obtained during
a period of unnecessary
delay 48.

F. There is insufficient
evidence to support a
conviction of appellants
on count two of the
indictment 50.

1. The evidence as to
Romero on count two
is insufficient 50.

2. The evidence as to
Tickle on count two is
insufficient 50.

G. The search warrant for
Tickle's home is legally
invalid as to Tickle 53.

H. Tickle's confession was
obtained in violation of
his constitutional rights:
it was obtained by a denial
of due process and fair
play; it was obtained by
denying him his right to
counsel; and it was the

product of an illegal

search of his home 53.

VI

Conclusion 62.

TABLE OF AUTHORITIES CITED

Cases	<u>Page</u>
Aguilar v. Texas, 378 U.S. 108	48.
Beck v. Ohio, 379 U.S. 89	13.
Bolen v. U.S., 303 F.2d 870	37.
Bynum v. U.S. 262 F.2d 465	30.
Collins v. Beto, 348 F.2d 823	29.
Cranor v. Gonzales, 226 F.2d 83	30.
Draper v. U.S., 358 U.S. 307	13.
Fikes v. Alabama, 352 U.S. 191	30.
Gatlin v. U.S., 326 F.2d 666	30.
Giordenello v. U.S., 357 U.S. 480	48.
Greenwell v. U.S., 336 F.2d 962	32.
Hernandez v. U.S., 300 F.2d 114	38.
Jones v. U.S., 362 U.S. 257	39.
Kerr v. California, 374 U.S. 23	61.
Mallory v. U.S., 354 U.S. 449	32, 33.
Miranda v. Arizona, 384 U.S. 436	27, 28, 30, 33, 52.
Payton v. U.S., 222 F.2d 794	30.
Rodella v. U.S., 286 F.2d 306	38.
Silverthorne Lumber Co. v. U.S., 251 U.S. 385 .	32, 40.
Spriggs v. U.S., 335 F.2d 283	32.
Stein v. New York, 346 U.S. 156	30.

	<u>Page</u>
U.S. v. Landry, 257 F.2d 425	38.
U.S. v. Ventresca, 380 U.S. 102	47.
Weeks v. U.S., 232 U.S. 383	61.
Wolf v. Colorado, 338 U.S. 25	61.
Wong Sun v. U.S., 371 U.S. 471	29, 32, 33.

Rules

Federal Rules of Criminal

Procedure, Rule 5(a)	31.
--------------------------------	-----

Statutes

United States Code, Title 18, §3231	2.
United States Code, Title 21, §174	1, 36.
United States Code, Title 28, §1291	2.
United States Code, Title 28, §1294(1)	2.

NO. 21686
NO. 21686-A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PEREA ROMERO and RONALD EUGENE TICKLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellant.

APPELLANTS' BRIEF

I

JURISDICTION

Appellants were indicted by the federal Grand Jury in and for the (then) Southern District of California on August 3, 1966, in two counts alleging violations of 21 U.S.C. §174; appellant Romero was charged in both counts; appellant Tickle was charged only in count two.

Appellants were arraigned, pleaded not guilty, made pretrial motions, were tried without a jury before the Honorable Albert Lee Stephens, Jr. On October 26,

1966, appellant Romero was found guilty on both counts, and on November 14, 1966, Romero was sentenced to fifteen years imprisonment. On November 14, 1966, appellant Tickle was found guilty on count two, and on December 12, 1966, Tickle was sentenced to five years imprisonment. Appellants made posttrial motions. On November 14, 1966, appellant Romero filed his Notice of Appeal; on December 20, 1966, appellant Tickle filed his Notice of Appeal.

The United States District Court for the Southern District of California had jurisdiction of the cause of action under 18 U.S.C. §3231. This court has jurisdiction under 28 U.S.C. §1291 and §1294(1).

II

STATEMENT OF THE CASE

On May 10, 1966, appellant Romero was arrested by agents of the Federal Bureau of Narcotics without a warrant of arrest.

On May 10, 1966, after Romero's arrest, federal agents secured and executed a search warrant on appellant Tickle's home [C.T. 50-52].^{1/}

^{1/} C.T. refers to Clerk's Transcript.

On May 10, 1966, federal agents arrested Tickle at his home without a warrant of arrest [C.T. 58, line 12].

On May 11, 1966, a complaint was filed before the United States Commissioner charging Tickle with receiving two ounces of heroin on May 10, 1966 [C.T.11].

On May 11, 1966, Tickle was arraigned before the United States Commissioner and released on a \$2,500 personal surety bond [C.T. 10].

On May 11, 1966, a complaint was filed before the United States Commissioner charging Romero with receiving fourteen grams of heroin on May 10, 1966 [C.T. 13].

On May 11, 1966, Romero was arraigned before the United States Commissioner and released upon the posting of a \$10,000 bail bond [C.T. 12].

On August 3, 1966, appellants were indicted in a two-count indictment in which: Romero alone was charged in count one with having received, concealed and facilitated the concealment and transportation of 6.5 grams of heroin on May 10, 1966; and both appellants were charged in count two with having received, concealed and facilitated the concealment and transportation of 19.4 grams of heroin on May 10, 1966 [C.T. 2-3].

On August 3, 1966, upon the filing of the

indictment, the court was requested and did issue warrants of arrest for the appellants and increased bail for Romero to \$35,000 and for Tickle to \$15,000; both appellants were arrested on these new warrants [C.T. 14-16].

On August 4, 1966, the government moved to reduce Tickle's bond from \$15,000 to a \$2,500 personal surety bond and the court so ordered [C.T. 5-7].

On August 5, 1966, Romero moved to reduce his bond; the motion was denied [C.T. 71].

Between the appellants' arrests and their indictment, there was no preliminary hearing; it was continued several times [C.T. 10 and 12].

On August 15, 1966, appellants were arraigned in the United States District Court; the court entered a plea of not guilty for them and set the case for trial on September 12, 1966 [C.T. 70].

Prior to trial, appellants moved for discovery and inspection [C.T. 18-23]; to suppress the evidence [C.T. 24-29]; and for severance [C.T. 30-34].

On October 5, 1966, the court ordered the appellants be severed for trial [C.T. 146].

On October 12 and 13, 1966, the court heard appellants' motions to suppress the evidence [C.T. 133];

the court denied the motions [R.T. 257].^{2/}

On October 13 and 14, 1966, Romero was tried by the court without a jury; and on October 26, 1966, the court found Romero guilty of both counts [C.T. 156].

On October 27, 1966, Tickle was tried by the court without a jury [C.T. 181] and on November 14, 1966, the court found Tickle guilty on count two [C.T. 182].

On November 14, 1966, Romero admitted a prior federal narcotics conviction and was sentenced to imprisonment for fifteen years on each count, to run concurrently [C.T. 174-175]; Romero filed his Notice of Appeal the same date [C.T. 177, 184].

On December 12, 1966, Tickle was sentenced to five years imprisonment [C.T. 183]; Tickle filed his Notice of Appeal on December 20, 1966 [C.T. 185].

III

STATEMENT OF FACTS

A. Preliminary Statement.

The appellants were jointly indicted, made joint pretrial motions, and had joint pretrial hearings; but they were tried separately. Romero's trial without a jury followed immediately behind a joint two-day motion

^{2/} R.T. refers to Reporter's Transcript.

to suppress the evidence, which was denied. Tickle was tried two weeks later by the same court without a jury.

B. Over-all Chronology.

In the fall of 1965, an unknown person named Juan Sanchez wrote three letters in Spanish and sent them to the Federal Bureau of Investigation, who in turn sent them to the Federal Bureau of Narcotics [R.T. 63-69]. One of these letters is dated September 23, 1965, and two are dated November 25, 1965 [R.T. 63-69]. The author of these letters was and is totally unknown [R.T. 69, 141]. These letters are anonymous, but they made allegations about Romero. The letters comment on certain historical facts relative to Romero, and then allege narcotics activity [R.T. 69-72, 75-78].

Upon receipt of these anonymous letters, the Federal Bureau of Narcotics initiated an investigation of Romero [R.T. 78] that included a check of Romero's long distance telephone calls, and learned that a number of calls were made from a telephone registered to Mrs. Romero to a telephone in the home of Tickle (a relative by marriage of Romero's) [R.T. 114]. Commencing in December of 1965 until the arrests in May of 1966, the agents conducted surveillance of Romero in excess of thirty times [R.T. 81-83]. The agents

also received some hearsay information from an unestablished chain of speakers that Romero was in touch with a person who had a narcotics conviction [R.T. 89-91].

On May 10, 1966, at least seven agents were surveying Romero [R.T. 93]; Romero was seen entering Tickle's home at about 5:20 P.M. [R.T. 92]; Romero left at about 6:10 P.M. [R.T. 93]; three cars of agents followed Romero; one agent only testified that he saw Romero enter a previously unsearched public telephone booth and leave without making a call [R.T. 168-170]. The testifying agent entered the booth and found a packet of brown powder, gave a signal to other agents, who then gave chase to Romero, who was in his car, and they caught, beat and arrested Romero a few blocks away [R.T. 171].

A bleeding Romero was given some kind of a warning and taken to a gas station [R.T. 222]. According to agents, Romero wished to speak to the agent in charge and when this was done Romero told him that there were narcotics in Tickle's home [R.T. 222].

An agent who was at the scene of Romero's arrest then went to downtown Los Angeles, met an Assistant United States Attorney, arranged for the presence of an United States Commissioner, executed an affidavit for a search warrant of Tickle's home, in

which he included statements allegedly made by Romero after being arrested, presented his papers to the United States Commissioner at his office, got a search warrant and then returned to join the other agents who were in the field still holding Romero [R.T. 95, 96].

Romero had not been taken before the United States Commissioner; he was held a prisoner by the agents [R.T. 98].

The agents arrived with a search warrant, then searched Tickle's home, found nothing, brought Romero into Tickle's home, and Romero allegedly showed the agents some heroin concealed in Tickle's home [R.T. 99]. The agents then arrested Tickle [R.T. 390].

The next day, May 11, 1966, after a night in custody, Romero and Tickle were arraigned before the United States Commissioner [C.T. 10].

On August 3, 1966, appellants were indicted and the government asked for and received warrants of arrest for both men and increased their bail [C.T. 14- On August 3 and 4, 1966, the federal agents secured a confession from Tickle in the absence of any counsel [R.T. 400]. In the process of obtaining this confession, the federal agents arranged to have the government attorneys move to reduce Tickle's new bail, which he could not make, to the former personal security bail,

which he could make, and when his confession was signed, this reduction in bail was accomplished solely by the government attorney in the court [C.T. 5-7] [R.T. 529]. This confession was admitted into evidence over objection [R.T. 602].

IV

SPECIFICATION OF ERRORS

A. Errors as to Romero.

1. Romero's arrest without a warrant was illegal as it lacked the prerequisite probable cause [C.T. 24-29].

2. Romero's statements after his arrest are not admissible into evidence and should have been suppressed as said statements were obtained in violation of Romero's constitutional rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution, and said statements were not voluntary and said statements were obtained during a period of "unnecessary delay" under Rule 5(a) Federal Rules of Criminal Procedure [C.T. 24-29] [R.T. 98,100].

3. There is insufficient evidence to support a conviction of Romero on count one of the indictment [C.T. 159].

4. The search warrant is invalid and any evidence obtained pursuant to it should be suppressed

as it does not set forth probable cause and it contains constitutionally inadmissible statements of Romero [C.T. 24-29] [R.T. 98,100].

5. Romero's statements at Tickle's home were obtained in violation of his constitutional rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution, and they are not voluntary statements, and they were obtained during a period of unnecessary delay pursuant to Rule 5(a) Federal Rules of Criminal Procedure [C.T. 24-29].

6. There is insufficient evidence to support a conviction of Romero on count two of the indictment [C.T. 159].

B. Errors as to Tickle.

1. There is insufficient evidence to convict Tickle on count two of the indictment [R.T. 602].

2. The search warrant for his home fails to set forth probable cause and any evidence taken from his home should be suppressed [C.T. 24-29].

3. The confession obtained from Tickle was obtained in violation of his constitutional rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution [R.T. 602].

SUMMARY OF THE ARGUMENT

A. There was no probable cause to arrest Romero without a warrant.

B. Romero's statements at the time of his arrest are not admissible into evidence as: they were obtained from him after an arrest without a warrant and without probable cause; they were involuntary; they were obtained without a prior proper constitutional warning; and they were obtained during a period of unnecessary delay.

C. There is insufficient evidence to support a conviction of Romero on count one of the indictment.

D. The search warrant is legally invalid as it does not set forth probable cause; it is also invalid as it uses the statements of Romero that are inadmissible; it is also invalid as it is the fruit of the poisonous tree.

E. Romero's statements and actions at Tickle's home during the search by agents of Tickle's home are not admissible into evidence as: they were obtained from him after an arrest without a warrant and without probable cause; they were involuntary; they were obtained without a prior proper constitutional warning; and they were obtained during a period of unnecessary delay.

F. There is insufficient evidence to support a conviction of appellants on count two of the indictment.

G. The search warrant for Tickle's home is legally invalid as to Tickle.

H. Tickle's confession was obtained in violation of his constitutional rights in that: it was obtained by a denial of due process and fair play; it was obtained by denying him his right to counsel; it was the product of an illegal search of his home.

VI

ARGUMENT

A. Romero's arrest without a warrant lacked probable cause and is an illegal arrest.

Even though the federal agents had been actively investigating Romero for some six months, he was arrested on the evening of May 10, 1966, without a warrant of arrest. The government has the burden of proving that they had probable cause to arrest Romero.

Probable cause exists where the facts and circumstances within the agents' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable

caution to believe that an offense has been committed or is being committed.

Beck v. Ohio, 379 U.S. 89 (1964);

Draper v. U.S., 358 U.S. 307 (1959).

Procedurally, the first issue is what can be considered as evidence of probable cause in this case. Appellants moved to suppress the evidence [C.T. 24-29] and the government filed an opposition to this motion [C.T. 46-60]. Attached to the government's opposition was a lengthy affidavit of Agent Lipschutz [C.T. 54-59]. Is this affidavit admissible on this issue of probable cause to arrest? In the trial court, Romero's attorney (not his present appellate attorneys) advised:

"Your Honor, this hearing, insofar as the defendant [Romero] is concerned, is not being submitted on the basis of the affidavits. We want some sworn testimony here. It's the defendant's position that where there is no search warrant and where there is no warrant of arrest, the burden is on the government to show probable cause. And they can't do that by the mere submission of affidavits.

THE COURT: If the court desires, then I will put on evidence concerning ...

MRS. DUNNE: Yes, sir." [R.T. 59-60]

Thus, all that can be considered by this court as to whether or not the government established that it had probable cause to arrest Romero is the sworn testimony in court at the hearing on the motion to suppress.

The government's evidence as to probable cause to arrest Romero on May 10, 1966, without a warrant consists of the following:

1. Three letters, written in Spanish, from an unknown, basically anonymous person that the government had never before heard of or from and whom the government was unable to identify or locate. These letters were not even sent to the Federal Bureau of Narcotics. One letter is dated September 23, 1965, and two bear the date November 25, 1965 [R.T. 63-69]. These letters allege that Romero is engaged in narcotics activities, and then provide identifying information about Romero such as his telephone number, that he had been a prisoner at McNeil Island, that in mid-November, 1965, he finished a detention period, and that his wife had been in an accident in Mexico. The agents verified this identifying information [R.T. 69-77]. These letters also allege that a Manuel Areyano is used by Romero to transport narcotics into the United States [R.T. 72]. The agent learned that a Manuel Areyano "was of record"

with Customs as a "suspect" [R.T. 72], whatever this means.

Some four months later, March 21, 1966, while the agents had Tickle's residence under surveillance, there were two cars at Tickle's home; and by tracing the license plates the agents determined that the vehicle with the Sonora, Mexico, plates was registered to Juana Arrelanes, the wife of Romero, and the vehicle with the California plates was registered to Manuel Arrellanes [R.T. 74-75, 107-108]. The agents acted on the basis that the Areyano named in the anonymous letters, written in Spanish, is one and the same person as the Arrellanes to whom a car is registered, in spite of the obvious fact that the names are quite different and that Romero's wife's name was Arrellanes. But even so, what does this add up to? Nothing more than a possibility on top of a suspicion; it certainly doesn't begin to be probable cause that Romero has committed a crime.

2. The agents obtained from the telephone company the list of telephone numbers that were called from a telephone in Romero's home [R.T. 79]. For at least six months prior to Romero's arrest, the agents secured such information and (without records presented in court) the agent testified that many calls were made to Mexico and many calls were made to Tickle [R.T. 79].

Once again, we must ask what does this prove? The agents knew that Romero was married and his wife has a car registered in Mexico and that she was in an automobile accident in Mexico; and further, that Tickle is related by marriage to Romero, and that the house that Tickle and his wife were living in was owned by Romero [R.T. 73, 75, 77, 114].

The agent obviously overstated his information when he said: "I also determined that Mr. Romero was calling individuals, who are of record in our office file, who have been convicted on narcotic violations." [R.T. 80] What he means is that the telephone in Mr. Romero's home was used to call a telephone number that is registered to some individual who had a narcotics conviction. Who made the call, who answered the call, who spoke to whom, and the subject matter of the conversation is totally unknown to the agents. They did not tap or monitor Mr. Romero's telephone, and they did not witness anyone using the telephone in Mr. Romero's home; so they just can't honestly state: "Mr. Romero was calling individuals, etc." It is this kind of overstatement or exaggeration that can mislead a court into deciding that what is actually mere suspicion constitutes probable cause.

3. During the four months prior to Romero's

arrest, the federal agents had him under surveillance "in excess of thirty times" [R.T. 82], and conducted some sort of financial check on his assets [R.T. 84]. This, of course, has no direct bearing on the issue of probable cause, but it does point out that the agents were spending a great amount of time secretly watching and following Romero and coming up empty; they did not see him commit an illegal act of any kind, nor did they obtain any evidence of any wrongdoing by Romero. This kind of activity can, of course, cause a suspicious agent to become quite frustrated and may explain over-statements, exaggerations, and over-eagerness.

4. During the four months prior to Romero's arrest, the surveying agents saw Romero visit Tickle's residence on some ten to fifteen occasions [R.T. 85]. The fact that Romero and his family are related to Tickle and his family, and that Romero is Tickle's landlord can not be discounted in weighing this innocent activity.

5. Five months prior to Romero's arrest, in December of 1965, Agent Lipschutz was advised that Romero and Tickle had been in Oakland near the residence of an ex-convict named Toliver, who had served time with Romero [R.T. 89-90]. Romero's trial counsel moved to strike this testimony and it was denied.

There was even allowed into the record that an informant in Oakland gave information to agents in San Francisco who telephoned it to Los Angeles that Toliver received narcotics from Romero [R.T. 90-91]. This is the rankest form of prejudicial inadmissible hearsay: an unidentified informant of unknown reliability who probably had no firsthand knowledge of anything talking to an agent at an unknown time or place and some time subsequently having the agent telephone it to another agent. It is doubtful that this could even form a basis for a reasonable suspicion, not to mention probable cause.

This, then, is the sum total of the agents' "knowledge" prior to May 10, 1966. Even the government does not contend that this constitutes probable cause that Romero committed a crime. In fact, as of this time, there is no evidence that a crime had been committed. Probable cause does not stand alone; it must be utilized in connection with a specific offense. Suffice it to say that as of May 10, 1966, the agents, at the most, were suspicious of Romero. They had expended some six months of investigation and had nothing. Could it possible be that there was nothing to have?

6. On May 10, 1966, at least seven federal agents were surveying Romero [R.T. 93, 119]. Why?

Was this any different than the prior thirty surveillances? Did the agents have any reason to believe that this day was to be different? Was there another informant involved - or the same informant in Oakland? The court sustained the government's objection to this line of inquiry [R.T. 123].

The agents saw the following events on the evening of May 10, 1966: At about 5:20 P.M., Romero entered Tickle's residence; Tickle was never seen; at about 6:10 P.M., Romero left Tickle's residence, entered his car alone and drove away with three federal cars in pursuit; Romero parked his car, left his car and walked across two streets [R.T. 92-94, 125-131]. Although there were seven agents in three different vehicles on the scene, only one agent saw the next series of events and he, Agent Downing, was the only one to testify about these events.

Agent Downing testified that he saw Romero walk across two streets and enter a single public telephone booth [R.T. 168]; that he, Agent Downing, was forty to forty-five yards from the telephone booth and across the street from the booth [R.T. 178]; that he had a sort of profile view of Romero in the booth [R.T. 168]; that he did not see Romero pick up the telephone receiver or deposit a coin or look in the

telephone book [R.T. 169]. Agent Downing testified on direct examination that Romero, while in the phone booth, did the following:

"Q. Would you tell us what he did?

A. I couldn't see that he did anything, really. I could see his hands move but I couldn't tell what he was [doing].

Q. Could you say what you observed his hands to do?

A. Really, I couldn't tell what they were doing.

Q. Which direction did they move?

A. They were in front of him.

Q. Did they reach up or below the phone?

A. They were about -- raised high, I would say, at the bottom of the phone.

Q. At the bottom of the phone.

How long was he in the phone booth?

A. Just a few seconds." [R.T. 169-170]

On cross examination, Agent Downing testified:

"Q. You state that you saw the defendant Romero go into the phone booth and do something with his hands or have -- carry his hands in some manner?

A. That is correct. I couldn't tell what

he was doing from that distance.

Q. In other words, he wasn't necessarily doing anything with his hands, was he, sir?

THE COURT: Let's have the witness resume the stand.

THE WITNESS: I am sorry.

THE COURT: Go ahead.

BY MR. SHERMAN:

Q. I will re-ask the question.

In other words, Agent Downing, you didn't see him do anything with his hands?

A. From what I saw, I could not state what he did with his hands." [R.T. 178]

The court, a few moments later, was called upon to rule concerning an aspect of Agent Downing's testimony, and in so doing summarized as follows:

"THE COURT: So, we know what happened. Whatever this witness says is that he walked -- all he has testified to is he saw Mr. Romero enter the phone booth. And he could not see what he did with his hands, but he didn't use the telephone and he didn't look up any number. He didn't put any money in the box. He left the booth and then the witness walked

in and found the package there." [R.T. 186]

This, then, is the sum total of the government's case as to what happened while Romero was in the phone booth.

Agent Downing further testified that after Romero left the phone booth, he, Agent Downing, went to the phone booth and underneath the phone he found a small package wrapped in tinfoil which he opened and found a brown powder [R.T. 170, 178-181]. Agent Downing stepped out of the booth, gave a "pre-arranged signal" and the other agents commenced the arrest procedure [R.T. 171]. When and why there was a "pre-arranged" signal is not disclosed by the record.

It is of paramount importance to note that the agents did not know that Romero was going to go to a phone booth and that the phone booth involved was neither searched nor under surveillance before Romero entered the phone booth. Agent Downing testified:

"Q. Agent Downing, did you search the phone booth before the defendant Romero went into it?

A. No, sir, I did not. [R.T. 178]

. . .

Q. Agent Downing, how long had you had this phone booth under surveillance before

Mr. Romero --

A. I didn't know where he was going when I saw him walking.

Q. What I am trying to say, Agent Downing, how long were you watching that area before --

A. I had been there just a short period.

I would say two or three minutes." [R.T. 187-188]

At this time in the chronology of events, the agents did not know what was in the package. And they did not know what was in the package until after Romero was arrested. They did not even perform a field test on the brown powder until after Romero was arrested. Agent Downing testified:

"Q. Did you subsequently at any time perform a field test?

A. Much later. I did not.

Q. Did you observe one performed?

A. I did.

Q. What was the reaction?

A. Positive reaction or opium derivative.

Q. This is the Marquis reagent test?

A. Marquis reagent test." [R.T. 170-171]

The evidence has now been reviewed, and the first issue is now clear: did the agents have probable

cause to arrest Romero? Essentially, the agents were suspicious of Romero over a six-month period; one agent saw him enter a phone booth and leave; one agent entered the booth and found a package of brown powder; no one saw him in possession of the package; no one saw him put the package in the booth; no one had seen or watched the booth prior to his entering the booth; no one had tested the brown powder; and we conclude that no one had probable cause to arrest Romero.

The events after Agent Downing gave his signal were related by Agent Saiz, who testified that he saw Romero enter a phone booth for a minute or less [R.T. 215] saw Romero return to his vehicle and just sit in it for a few minutes in view of the booth while Downing entered the booth, left the booth and then signalled [R.T. 216]; Romero, who is situated so as to see all of this, then started to drive away [R.T. 216]; Agent Mendelsohn in his car (the same one Downing had been in) then radioed Saiz and his partner, Watson, to arrest Romero [R.T. 217]. Then, according to Saiz, within a few blocks of the telephone booth, the following events took place: the agents pulled their vehicle alongside of Romero's and flashed a badge and told him to pull over; Romero's car sped up, tried to take a corner, spun out of control and stopped, and the agents hit him over the

head with a gun barrel, shot out one of his tires, and arrested him [R.T. 217-219]. The agents were in plain-clothes as they have no uniforms, and their cars are plain, unmarked cars and the time was about dusk, 6:30 on a May 10th evening.

Appellants have tried to set forth all of the salient evidence of probable cause to arrest Romero for a violation of the federal narcotics law; and in so doing, conclude that there is no probable cause to arrest - suspicion, yes, but probable cause, no. Appellants, later in this brief, will argue the sufficiency of the evidence to convict Romero on count one, but wish to point out here that this is the sum total of the evidence on both the issue of probable cause to arrest and the proof of guilt beyond a reasonable doubt that Romero received, concealed and facilitated the concealment and transportation of the brown powder found in the phone booth. Obviously, if upon these facts there is no probable cause to arrest, then on the same evidence there cannot, as a matter of law, logic and reason, be sufficient evidence to convict. Additional arguments on these facts are presented later herein on the question of the sufficiency of the evidence to convict Romero on count one of the indictment.

B. Romero's statements at the time of his arrest are not admissible into evidence as his arrest was illegal, the statements were not voluntary, he was not properly warned of his constitutional rights, and the statements were obtained during a period of "unnecessary delay."

1. Preliminary statement.

We think it is important at the outset to distinguish the three separate and distinct legal occasions when Romero's postarrest statements were utilized: first, in the agent's affidavit to obtain a search warrant of Tickle's home; second, at the hearing on the motion to suppress evidence; and third, possibly at the trial on the merits.

2. Romero's arrest, warning and statement.

There is a sharp conflict in the evidence as to the conduct of the agents when they arrested Romero. The arresting agents testified that when Romero's car spun out of control and stopped with its motor dead, they approached his car with drawn guns and Romero resisted arrest, which necessitated an agent shooting out a tire on Romero's car and then smashing his gun barrel onto Romero's head and hitting Romero with his fist. [R.T. 209-211, 219-222, 289]

Two disinterested witnesses, Mrs. Zimmer and Mr. Alger, who live at the scene of the arrest, testified that once Romero's car stopped, it never moved again, and that the agent beat Romero as he was stepping out of his car, and that Romero was not struggling or fighting when he was smashed over the head with a gun [R.T. 232-243]. It would appear that the agents' testimony on this issue was seriously impeached. In any event, everyone is in agreement that Romero was severely beaten on and about the head, that he nearly fell to the ground, that he was bleeding from a head wound with sufficient profusion that his face, neck and shirt were all bloody [R.T. 201].

After Romero was arrested, he was handcuffed with his hands behind his back, placed in the back seat of his own car, and driven on the flat tire several blocks away to a gas station [R.T. 221-222]. On the way to the station, the agents gave him what is conceded to be an insufficient warning under Miranda vs. U.S., 384 U.S. 436, 86 S.Ct. 1602 (1966).

According to the testimony of Agent Mendelsohn, when Romero got to the gas station, Mendelsohn gave him a warning (which is also conceded to be insufficient under Miranda), and then Romero told him that if the agents were fair with him, he would be fair with

the agents and that the rest of the heroin was stashed at Tickle's residence [R.T. 193, 196].

The court said: "The warning that was given to Mr. Romero doesn't meet the Miranda standard, I do not think the government would contend that it does." And the government counsel replied: "No, I do not, your Honor." [R.T. 250] Now then, the issue is clear: what use, if any, can the prosecution make of an arrestee's statement that was obtained without giving the arrestee a proper constitutional warning? We think the law clearly states that no use can be made of such statements.

3. Securing the search warrant.

Agent Lipschutz was present when Romero was arrested at about 6:30 P.M. on May 10, 1966. As soon as Romero was arrested, Agent Lipschutz left the scene of the arrest, drove to downtown Los Angeles, met with an Assistant United States Attorney, arranged to have the United States Commissioner come back to the federal building, prepared a search warrant and affidavit in support of the search warrant, took them before the United States Commissioner, and when the search warrant was issued, he returned to the area where Romero was still being held by other agents [R.T. 95-97, 130-133]. Romero was not taken before the United States Commissioner

but while Agent Lipschutz was preparing his affidavit for the search warrant, Agent Mendelsohn telephoned him and advised him that Romero had made the statement, "That if they would be fair with him, that the heroin was in Tickle's house," and Agent Lipschutz put this exact statement in his affidavit for the search warrant [R.T. 96, 133] [C.T. 51]. This, then, was the first time the government used this statement obtained from Romero.

4. Romero's arrest was illegal; therefore, this statement is not useable by the government.

If this court agrees that when the agents arrested Romero without a warrant, they lacked probable cause and, therefore, his arrest is illegal, then the only permissible conclusion that can be legally drawn is that Romero's statement is totally suppressible as unlawfully obtained evidence.

Wong Sun v. U.S., 371 U.S. 471,
83 S. Ct. 407 (1963).

The clear holding of the Wong Sun case is that verbal evidence immediately derived from an unauthorized arrest is the "fruit" of official illegality and cannot be used by the government.

See also: Collins v. Beto, 348 F.2d 823

(5th Cir. 1965);

Gatlin v. U.S., 326 F.2d 666 (D.C. Cir. 1963);

Bynum v. U.S., 262 F.2d 465 (D.C. Cir. 1958).

5. Romero's statement should be suppressed as it was not voluntary.

As we pointed out above, Romero was beaten, bleeding, handcuffed and in custody, and within minutes thereafter he made a statement that can be construed as an admission or a confession. The problem of physical violence preceding a confession was dealt with by this court in Cranor v. Gonzales, 226 F.2d 83 (9th Cir. 1955), wherein the court stated in reiterating and partially quoting the opinion of Justice Jackson in Stein v. New York, 346 U.S. 156 (1952), "Physical violence or the threat of it automatically invalidates confessions, and in such cases, there is no need to weigh or measure its effects on the will of the individual victim."

Payton v. U.S., 222 F.2d 794 (D.C. Cir. 1955) is a remarkably similar case to the instant one and that court ruled that the confession was inadmissible. See also Fikes v. Alabama, 352 U.S. 191, 198 (1957).

6. It is conceded that Romero was given an inadequate constitutional warning, and thus Romero's statement is excludable.

In the Miranda case (supra), the court held

that unless and until the prescribed warning is given, no evidence obtained as a result of interrogation can be used against the person. The government very properly conceded that it could not use Romero's statement at the trial on the merits [R.T. 204]. And the court several times during the hearing on the motion to suppress evidence, including these statements, commented on whether or not this statement was admissible at either the hearing on the motion or at the trial on the merits, but the court denied the motion to suppress and upheld the search warrant, and still admitted this statement into evidence at the trial on the merits [R.T. 252-255, 260-263].

7. Romero's statement is excludable because it was obtained during a period of unnecessary delay under Rule 5(a) Federal Rules of Criminal Procedure.

After Romero was arrested, an agent at the scene of the arrest was able to go and appear before a United States Commissioner and secure a search warrant by utilizing a past arrest statement of Romero, but Romero was not taken before that same Commissioner. This is a classic case of a violation of Rule 5(a), and the United States Supreme Court has clearly spelled out the legal consequences of such delays.

Mallory v. U.S., 354 U.S. 449, 77 S.Ct. 1356 (1957), does not permit the use of any statements obtained during a period of unnecessary delay. The rule of the Mallory case not only applies to the statements made to Agent Mendelsohn but a fortiori to Romero's statements made at the time of the search of Tickle's home.

See: Spriggs v. U.S., 335 F.2d 283 (D.C. Cir. 1964)
Greenwell v. U.S., 336 F.2d 962 (D.C. Cir. 1964)

8. Romero's statement is not to be used at all, even in the affidavit for the search warrant.

The Supreme Court in Silverthorne Lumber Co. v. U.S., 251 U.S. 385, 40 S.Ct. 182, as requoted in the Wong Sun case, explicitly stated:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like

any others, but the knowledge obtained by the Government's own wrong cannot be used by it in the way proposed." (p.183)

Here we have statements obtained from Romero that are not admissible for any purpose for any one of the following reasons:

(a) He was arrested without probable cause, and his statements thereafter are illegally obtained;

Wong Sun;

(b) He was beaten and bloody and handcuffed, thus his statements are not voluntary;

(c) He was not properly warned and thus his statements were obtained by violating his rights under the Fifth and Sixth Amendments to the Constitution;

Miranda;

(d) He was not promptly arraigned after his arrest and his statements were obtained during a period of unnecessary delay, and thus are excluded; Mallory.

For any one of these reasons, standing alone without the other three, the court should have rejected Romero's statements.

C. There is insufficient evidence to support a conviction of Romero on count one of the indictment.

We have carefully and perhaps laboriously reviewed

all the evidence the government presented on the issue of whether there was probable cause to arrest Romero, and we will not repeat it again here. This evidence was presented on the hearing on the motion to suppress evidence, but when said motion was denied the parties agreed to waive jury and submit the matter to the court on the evidence presented at the hearing on the motion to suppress [R.T. 259].

The trial court during the hearing on the motion to suppress summarized the evidence at one time as follows:

"THE COURT: I don't agree with you. It seems to me that here we have a man who purportedly has made some voluntary statement that ties him into this drop of narcotics.

No one has testified that he saw Mr. Romero with a package in his hand prior to the time that he entered the phone booth. No one knows what was in the phone booth, if anything, prior to the time that he entered it. They didn't know he was going to be in there.

After he went in there, they went in and found this heroin there. This doesn't necessarily mean that he is the one that dropped

that heroin there. It's a long way from any proof of that.

However, now, in order to show that he did, you tender a statement which purportedly is a voluntary statement. You advised him of his rights and so forth. At the time he made the statement, he had blood on his head, face and shirt, and he had been arrested.

MRS. DUNNE: Yes.

THE COURT: Maybe, as far as I know, beaten to a pulp." [R.T. 200-201]

In spite of this relatively accurate summary of the evidence and in view of the fact that the government had no additional evidence on count one, the court still convicted Romero. If Romero's statements to Agent Mendelsohn are in fact and in law not admissible at the trial on the merits, then clearly there is insufficient evidence to convict. And the court, in its summary above and in its later review of the evidence when it agreed to accept the jury waiver, indicated that it would receive Romero's statements into evidence at the trial on the merits [R.T. 261-263]. And again, the court, when it reviewed the evidence prior to rendering its finding of guilt, stated: "I think that his statement was admissible" [R.T. 368]. Thus, we have a

situation wherein the government had agreed with the defense that these statements were not admissible at the trial, yet the court accepted them into evidence. Obviously, if these statements are not admissible, there is not enough evidence to prove beyond a reasonable doubt that Romero "received" the heroin found in the phone booth, or that Romero "concealed" said heroin (it was not in fact concealed in the phone booth, according to Agent Downing's testimony), or that Romero "facilitated the concealment and transportation" of said heroin.

What if some other person had entered the phone booth after Romero - would he be guilty of the same charge? The government offered no evidence as to the presence or absence of fingerprints on the tinfoil wrappings of the heroin.

In order to establish the guilt of Romero, the government had to be relying on the presumption contained in 21 U.S.C. §174:

"Whenever on trial for a violation of this section, the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the

satisfaction of the jury."

There is no proof that Romero ever possessed the heroin found in the phone booth. Proximity is not possession. All the government proved was that Romero was in a phone booth where they subsequently found some heroin. The phone booth was neither searched nor watched prior to Romero's entrance into it, and the booth is located some ten to fifteen feet from the entrance to a bar.

The agents were suspicious of Romero, they had been "working him" without success for some six months, they were probably frustrated, they were out that evening "en masse," they were looking very hard for something - anything to confirm their suspicions, and they were blinded by their own eagerness.

Isn't it a perfectly reasonable hypothesis on the evidence viewed in the light most favorable to the government to conclude that Romero was to go to the phone booth to pick up the heroin, but with all the agents around he became leery or suspicious and refused to pick it up; instead, he returned to his car and waited, and when Downing went in the booth, Romero left.

See: Bolen v. U.S., 303 F.2d 870

(9th Cir. 1962).

The government must prove possession of the heroin, and here there was a total failure of such proof. Possession here means personal physical custody and control; or stated another way, it means under one's control or dominion.

Hernandez v. U.S., 300 F.2d 114 (9th Cir. 1962).

The mere presence in the vicinity of narcotics or the mere knowledge of physical location of narcotics does not in and of itself prove possession.

Rodella v. U.S., 286 F.2d 306 (9th Cir. 1960);

U.S. v. Landry, 257 F.2d 425 (7th Cir. 1957).

An objective review of all the admissible evidence on the issue of guilt can only lead to the conclusion of not guilty.

D. The search warrant is legally invalid as it does not set forth probable cause; it is also invalid as it uses as part of its probable cause illegally obtained statements from Romero.

Agent Lipschutz secured a search warrant for Tickle's home. The court ruled that the warrant was valid. The court questioned Romero's standing to challenge the search warrant. The court said:

"The search warrant has another point which I do not think anyone has raised, but I will

mention it. While the house belongs to Mr. Romero, at this point he is not the occupant of it. There is a question raised in my mind as to whether or not he would have standing to object to a search under those circumstances. If he has no standing to object to a search, then he would have no standing to object to the basis of the search warrant or otherwise. If he contended that it was his home and that it was his material that was picked up and so forth, which I think probably he would not want to contend, then the circumstances might be different."

[R.T. 262-263]

1. Romero has standing to contest the validity of the search warrant and the search of Tickle's home.

Romero was charged, tried and convicted of receiving and concealing the heroin that was found in Tickle's home, and further, he owned the home. The government did not contest Romero's standing to object. The trial court was clearly in error on this point.

Jones v. U.S., 362 U.S. 257, 80 S.Ct. 725 (1960).

2. Romero's statement in the affidavit for the search warrant renders the search

warrant invalid.

The affidavit for the search warrant recites that Romero said to Agent Mendelsohn: "That if they would be fair with him, that the heroin was in Tickle's house."

We pointed out above that the Supreme Court in the Silverthorne case (supra) clearly forbade the government from making any use of illegally obtained evidence.

To dramatize the point, just assume that Romero had said: "The heroin was in Tickle's house" over the telephone, and that the federal agents had illegally wiretapped his telephone and had intercepted this statement. Could it be used to secure a search warrant? Clearly: no. Here there are four different and separate legal reasons why Romero's statement is illegally obtained, and any one of them is sufficient in and of itself to totally prohibit the government from using this statement in the affidavit to secure a search warrant.

If this statement were not in the affidavit, then there is no probable cause that there is heroin in Tickle's house and the search warrant would be insufficient on its face. Appellants would expect the government to concede this point.

3. The search warrant is insufficient on

its face as it does not establish
probable cause.

The affidavit in support of the search warrant is so carelessly drawn that this alone should render it invalid. Note the following: the search warrant itself is dated the 3rd of May, 1966, and the 3rd is lined out and a "10" written in above it, and no initials anywhere; the same obliteration appears on the affidavit except there are two unidentified initials under the scratchout; the printed form "Affidavit for Search Warrant" contains the typed-in statement: "See attached affidavit," and it does not say whose affidavit is attached, and in fact there is no affidavit attached - merely a typed statement that is nowhere sworn to or properly incorporated by reference; the attached typed statement has no ending - no period at the end of the last sentence and no signature of any kind; and this attached typed statement even has an "etc." in it at the critical point of what rights Romero had been advised he possessed.

Perhaps the agents tried to obtain a search warrant on May 3, 1966, and were turned down because of a lack of probable cause. In any event, the government - its agents, attorneys and Commissioners - should be held to a higher degree of competence when

it involves securing a search warrant for the search of a man's home.

An analysis of what is contained in the search warrant may be somewhat repetitive of our analysis of the evidence of probable cause to arrest Romero; however, a brief review will be of assistance.

The first paragraph refers to the letters from the anonymous Juan Sanchez. However, there is some candor lacking as it states that Juan Sanchez is a "Mexican National" and the affiant testified at the hearing that he had no idea who Juan Sanchez was; also the dates (September and November, 1965 - some six months prior to this affidavit) on the letters is not provided.

The second paragraph recites Romero's former conviction eight years before the date of the affidavit, and his pending appeal (which this court reversed on stipulation of the parties).

The third paragraph deals with telephone records relative to the telephone in Romero's residence. It overstates and is inaccurate when it states that: "A toll check of Romero's residence phone disclosed numerous calls to at least twenty people who are of record with this office and who have narcotic convictions." All that the toll check could show is

that a number was called; it is this type of exaggeration that leads to errors. This paragraph also mentions that Tickle used Romero's credit card in Oakland in December, 1965, (five months before) to rent a car which was returned by Toliver, and that an informant stated that "Toliver had received his narcotic supply that day from the person in the rented vehicle." Nothing more is said about this informant. We are not told: whether he is reliable or not, what the basis of his information was, was he a witness, who the informant gave this information to, or even who was the person in the vehicle. The value of this type of statement for probable cause is, of course, nil, but why is it in the affidavit?

The fourth paragraph recites the surveillance of Romero, but it does not give any dates. It further recites that there were twenty-five to thirty telephone calls from Romero's residence to Tickle's residence, but it does not say in which time period; nor does it disclose what the agent knew: that Romero was Tickle's landlord, and that Romero's family and Tickle's family were related. This paragraph also states that on March 21, 1966, (nearly two months before the affidavit) a truck was seen at Tickle's home, the plates of which showed the truck was "checked out to Manuel Arrellanes,

who is the person mentioned in the letters from Juan Sanchez." Now, this is just not true. Nowhere in the affidavit is there any mention of any names in these letters, but what is worse is the fact that the letters say Areyano, not Arrellanes. The affidavit also fails to disclose that Romero's wife's name is Arrellanes.

If the affidavit stopped at the end of the fourth paragraph, there would be no issue here as there would not have been a search warrant. Up to this point all that is set forth is suspicion; there is no probable cause that there are narcotics in Tickle's home.

The fifth and last paragraph provides as follows:

"On May 10, 1966, at about 5:20pm, ROMERO arrived in his 1966 Cadillac at TICKLE's residence and entered later he left and was followed by Agents to the SW corner of Meeker and Garvey where he was observed to enter a phone booth whose telephone number I was told by Agent Mendelsohn is 448-9261. He appeared to leave something near the phone as he made no call. He left returned to his car and sat in it. Agent Downing upon instructions, entered the booth and retrieved a tin foil package

which contained heroin (field test).

ROMERO observed this and left hurriedly in his car. He was overtaken after swerving his car and attempting to flee on foot. I have been told by Agent Mendelsohn that ROMERO stated to him after being advised of rights, etc., that if they would be fair with him that the heroin was in TICKLE's house "

The first sentence fails to disclose the time Romero entered the phone booth, and how Agent Mendelsohn obtained the telephone number in the phone booth and relayed it to the affiant is never made clear. The second sentence is not true. No one saw Romero leave something near the phone, and what the affiant does not state is that he didn't even see Romero in the phone booth, but another agent did. It sounds as if the affiant was watching the booth, which he wasn't. What is the meaning of "appeared?" Does it follow that because no call was made that it appeared something was left in the booth?

The sentence about Agent Downing is not true. It states that Downing "retrieved a tin foil package which contained heroin (field test)," and Agent Downing did not field test the contents of this tin foil

package. In fact, Agent Downing testified that someone else performed the field test at a time "much later" than when he picked up the package [R.T. 170-171]. Thus, at the time of this affidavit the truth apparently was that the agents had a tin foil package that contained an unknown brown powder.

The next statement: "Romero observed this and left hurriedly in his car," is a conclusion drawn by someone not present. What did Romero observe? The field test? Where was Romero in relation to the phone booth at this time, and what does "left hurriedly" mean?

The next sentence is also inaccurate as the evidence clearly showed that Romero never attempted to "flee on foot." But this same sentence does state that Romero was "overtaken." Thus, the United States Commissioner would know that Romero had been arrested. Of course, the final sentence (if indeed it is a sentence) conclusively establishes for the Commissioner that Romero is in federal custody. What does the statement attributed to Romero: "If they would be fair with him that the heroin was in Tickle's house" mean within the framework of this affidavit for a search warrant of Tickle's house? What heroin was in Tickle's house? The only heroin mentioned in the affidavit is

the "heroin" from the phone booth, and even if that "heroin" had been in Tickle's house that does not establish probable cause that there was then and there any heroin in Tickle's house. The Commissioner was not told about shooting out the tire and smashing a gun barrel over Romero's head before Romero made the statement to Mendelsohn. And what does "if they would be fair with" Romero mean in this context? Does it follow that they had not been fair up to that time? Does the statement also mean that if they were not fair with Romero then the heroin was not in Tickle's house? At the very least, the Commissioner should have ordered the agents to bring Romero before him immediately before he would issue such a search warrant.

The lengthy recital in the affidavit does not add up to probable cause to justify the issuance of the search warrant. As Justice Douglas said in his dissenting opinion in U.S. v. Ventresca, 380 U.S. 102 (1965):

"The present case illustrates how the mere weight of lengthy and vague recitals takes the place of reasonably probative evidence of the existence of crime."

In passing on the validity of the search warrant, only the information set forth in the warrant may

be considered.

Giordenello v. U.S., 357 U.S. 480 (1958).

The leading case on the validity of an affidavit in support of a search warrant is Aquilar v. Texas, 378 U.S. 108, 84 S.Ct. 1514 (1964), wherein the court said: "The Court must still insist that the magistrate perform his neutral and detached function and not serve merely as a rubber stamp for the police."

If it is the government's intention to treat Romero as an informant for purposes of the search warrant, then the Aquilar case would clearly outlaw this on grounds of reliability. But, Romero is not an informant; he is an arrestee who had been beaten, inadequately warned of his constitutional rights, and deprived of a prompt arraignment before a judicial officer.

This search warrant is legally defective and the ensuing search is illegal. The evidence obtained from this search is inadmissible and both appellants should be acquitted on this count. There is no other basis to support the search of Tickle's home. The government has never contended that either Tickle or Romero consented to such a search, and the evidence is clear that they did not consent to such a search.

E. Romero's statements and actions at
Tickle's home during the search of

Tickle's home are inadmissible as evidence as: they were obtained from him after an arrest without a warrant and without probable cause; they were involuntary; they were obtained without a proper prior constitutional warning; and they were obtained during a period of unnecessary delay.

After Romero's arrest, an agent left the scene of the arrest and secured a search warrant. Romero was kept in the field rather than arraigned. The agents executed the search warrant as follows: they entered Tickle's home, Tickle told them that he would show them "where Dave keeps it," Tickle showed them a bag that, when searched, contained nothing of a narcotic nature, the agents started searching the entire place and found nothing, other agents brought Romero into the house and he told them that "the package is up under the sink." [R.T. 386-388].

There is no need to belabor the points made earlier in reference to Romero's statement to Agent Mendelsohn; each of them applies to his statements and acts in Tickle's home, and each of them invites only one conclusion: that these acts and statements

are inadmissible for any purpose.

Even the trial court indicated that it did not think that either Romero's or Tickle's statements at the time of the search were admissible in evidence [R.T. 255, 256].

F. There is insufficient evidence to support a conviction of appellants on count two of the indictment.

1. The evidence as to Romero on count two is insufficient.

Romero's statements to Agent Mendelsohn and his acts and statement to the agents searching Tickle's home provide the only evidence that Romero received or concealed the heroin found in Tickle's home. These statements are not admissible evidence, and as soon as this court reaches that opinion, then the conviction on count two must be reversed. Naturally, if this court concurs that the search warrant is legally insufficient, then there is no legal evidence of the violation of law charged in count two and the conviction on count two would be reversed.

2. The evidence as to Tickle on count two is insufficient.

The total evidence relative to Tickle falls into three categories: Tickle's statements to the

agents searching his home; the heroin found in Tickle's home; and Tickle's confession. If the search of his home is illegal, as we contend, the case is over.

It is important to establish the chronology of events with Tickle.

Agents arrived at Tickle's residence at 8:30 P.M. on May 10, 1966 [R.T. 386]. Agent Lipschutz told Tickle "he didn't have to say anything" and then proceeded to ask Tickle if he had any narcotics at the residence [R.T. 387]. Tickle said, "I'll show you where Dave keeps it," and then proceeded with Agent Lipschutz to a back hall closet area. At that point, Tickle showed Lipschutz a black briefcase and stated, "That's where Dave keeps it." [R.T. 387] Agent Lipschutz opened the briefcase and searched it but found nothing of a narcotic nature [R.T. 387]. After this occurred, the other agents started searching the premises and curtilage [R.T. 388].

Shortly thereafter, other agents arrived with David Romero [R.T. 388]. Romero told Tickle that he, Romero, was going to cooperate and Romero said to the agent that "the package is up under the sink." [R.T. 388] Agent Lipschutz reached up where Romero had instructed him to and retrieved the package wrapped in black electrician's tape. He opened the package and it

contained opium [R.T. 388, 389].

Tickle was arrested on May 10, 1966, and he was arraigned before the United States Commissioner on the morning of May 11, 1966 [R.T. 390, 391] at which time he was represented by counsel.

Tickle was apparently not advised that he was arrested until after the heroin was found, but query what if as the agents entered his home with the search warrant he had tried to leave his own home? In any event, the initial warning given to Tickle was not a proper constitutional warning per Miranda (supra). It would appear that if when a man is arrested that he must be properly warned before his statements could be used against him, then a man whose home is suddenly invaded by agents with a warrant to search his home for contraband should also be properly warned. Tickle's statement is not a volunteer's comment; it was given as an answer to the searching agent's question.

In order to convict Tickle on count two, the government had to prove that Tickle possessed the heroin and the government's own evidence is that Tickle not only did not possess the heroin but he did not know where it was, even though it was in his own home.

Romero owned the house; Romero had been seen at Tickle's house many times [R.T. 408]; Romero had a

key to Tickle's house; Romero had been seen coming out of Tickle's house several hours before the search of the house; and Romero and Tickle are related. The government never proved that Tickle possessed the heroin found in his house; in fact, the government proved that Tickle didn't know where the heroin was located, and that they themselves couldn't find it, and that Romero was the only one who knew where it was located.

G. The search warrant for Tickle's home
is legally invalid as to Tickle.

There is no question that Tickle has standing to challenge the search warrant which authorized a search of his home. What we said above in reference to the invalidity of the search warrant applies equally here to Tickle.

H. Tickle's confession was obtained in violation of his constitutional rights: it was obtained by a denial of due process and fair play; it was obtained by denying him his right to counsel; and it was the product of an illegal search of his home.

On May 11, 1966, Tickle was represented by private counsel at his arraignment before the United States Commissioner. Prior to Tickle's indictment, Tickle's attorney advised Agents Mendelsohn and Theisen,

the agent in charge, that he was representing Tickle [R.T. 445, 446]. Between Tickle's arrest on May 10, 1966, and his indictment on August 3, 1966, Tickle was at liberty on a \$2,500 personal surety bond [C.T. 10].

On August 3, 1966, Tickle was indicted; and at the government's request (without advising the court that Tickle had already been arrested and had posted bail on the charge for which he had been indicted), the government asked for a new warrant of arrest for Tickle and that bail be set at \$15,000 [C.T. 14-16, R.T. 391]. That same night the agents went to Tickle's home and arrested him. [R.T. 391, 392] The agents took Tickle to their office and interviewed him in the absence of counsel [R.T. 393]. The agents knew that Tickle had counsel [R.T. 397]. That night they kept Tickle in the Monterey Park jail rather than the usual Los Angeles County Jail [R.T. 397, 398].

On the following morning, August 4, 1966, the agents again brought Tickle to their office where they warned him, interrogated him, and obtained a signed confession from him [R.T. 398-404; Ex. 2,3]. During the course of the interrogation and prior to obtaining the confession the following events relative to Tickle's bond occurred: Tickle advised the agents he couldn't make a \$15,000 bond, and the agent said that he would

speak to the United States Attorney about a reduction; on the morning of the 4th, the agent spoke to his superior, Mr. Theisen, and then to the United States Attorney's office, requesting they arrange for a bond reduction; the agent told Tickle that the United States Attorney would recommend a bond reduction; the United States Attorney's Office, apparently on behalf of Tickle, made a written motion to reduce Tickle's bond to \$2,500 personal surety bond on the grounds that "The Government feels that the \$2,500 personal surety bond is sufficient to guarantee the defendant's appearance at the time of trial;" the court, still ignorant of all the intrigue, granted the government's motion; and Tickle signed a confession prepared and typed by the agents [R.T. 425, 428, 429, 529; C.T. 6-7].

Also during the course of this interrogation on August 4, 1966, in the agents' offices, the following events relative to Tickle's attorney occurred: Tickle's attorney, known to be such to the agents, telephoned the agents and told them to stop interrogating his client, Tickle, and that he was on his way down [R.T. 509]; minutes later, Tickle's attorney came to the agents' office, was kept waiting fifteen or twenty minutes and was then allowed to see Tickle in the presence of four agents, at which time Tickle told him he had another

attorney and did not want to talk to him [R.T. 426-427, 440-444, 508-511]; thereafter, Tickle signed the confession and was released on bond.

We have intentionally omitted what Tickle testified to regarding what the agents told him about attorneys so as to present this in the view most favorable to the government.

The trial judge, who was the same judge that had issued the warrant upon the return of the indictment and set the bail for Tickle at \$15,000, when he became aware of the tactics outlined above, said:

"But, now, here is the situation, and I might as well state it right now. I think that it is reprehensible that the Government will go out and pick up somebody, as in this case, bring him before the United States Commissioner and have a hearing where the Commissioner, after the case has been presented to him on a complaint -- after the Commissioner has released the man on a \$2,500 personal recognizance bond, then, of course, he is released. He also is represented by an attorney.

What the relationship between that attorney and the defendant is is a matter

which ordinarily is a matter of confidential relationship. And as far as the Bureau of Narcotics or any other agent of the Government and the United States Attorney is concerned, that man continues to represent the defendant until they are told to the contrary.

It may be that there is no opportunity, as in this case, to render any order or to record any appearances except with the Commissioner which would fix or settle this matter.

In this case it happens that the record shows, but the Bureau of Narcotics didn't know it. This is on the report made before the Commissioner, which was filed August 19, 1966: 'Richard Sherman, preliminary only, first presentment.' But it shows that he represented Ronald Tickle.

That may be there, but I do not know that that necessarily ends the relationship of Mr. Sherman and Mr. Tickle.

On August 15th there was filed by the clerk, and apparently signed by both Mr. Tickle and Mr. Sherman, a designation of counsel and

appearance praecipe. I am sure this came before.

It was after this that Mr. Sherman presented to the court that he and Mr. Tickle had had some disagreements with respect to this matter. In fact, it was when it was coming up for trial, and we had to postpone it in order to let Mr. Tickle get other counsel.

This is how we stand in this particular case and undoubtedly in many other cases. But it has never come so forcibly before me as this.

A man is arrested. He is represented by counsel. He is taken before the Commissioner. There is a complaint there which charges what subsequently turns out to be the very same charge as is charged in the indictment. The Commissioner lets him out on a \$2,500 bond. The Bureau of Narcotics then recommends a twenty or fifteen thousand dollar bond to the U.S. Attorney. The United States Attorney has this information available, too. They recommend this to the court at the time that the Grand Jury returns the

indictments as presented.

Here is the record of that.

It came before me that a warrant should be issued for this man's arrest, which indicates to me that this man has not yet been arrested. Nothing is said to me that he has been arrested and released on bail in an amount the Commissioner thought was reasonable in view of all the circumstances,

But they set a \$15,000 bail and asked that a warrant be issued.

I know that I inquired about this bail, because I note here in the second case, Pool and Utterback, I reduced their bail from \$500 to \$200, and I put my initial on it.

When it came down to this case I remembered it, and I asked why these bails were so high. They made a representation to me as to why they were so high, but never disclosed that Mr. Tickle had been arrested, brought before the Commissioner and released on a \$2,500 surety bond, or that he was represented by counsel.

Now, then, with that they go out and

arrest him again, obviously, to me, the way I see it now, so as to have him under arrest and be able to question him and possibly without his attorney. They do not notify the attorney.

So Mr. Tickle continues. They interrogate him. Then they promise big-heartedly that they are going to reduce his bond when they know that the chances are that if anyone would come and make a bond reduction, and had Mr. Sherman known on the 3rd that Mr. Tickle was in custody he undoubtedly would have gotten a bail reduction to the \$2,500 OR and he would have been out.

This is not in keeping with the laws of the United States. It is not in keeping with the new Bail Act, and I hope that this practice is going to cease now.

I am going to address a letter to all the rest of the judges of this court and suggest that we adopt a rule which will require that every time a return of a Grand Jury indictment is made, that the judge be advised as to whether or not the person has heretofore been arrested on this charge or

a similar one so that this can come to the attention of the court.

That is the reason I asked these questions.

MRS. DUNNE: Yes, sir.

THE COURT: Whether or not Mr. Tickle's constitutional rights have been violated or not is something that I have to give further consideration to." [R.T. 540-544]

The court was totally justified in its anger and observations; but the court still admitted Tickle's confession into evidence and found him guilty.

The federal appellate courts have supervisory authority over the lower courts administration of the laws and rules of evidence, and in this instance it should be exercised strongly and vigorously by throwing this confession out.

Weeks v. U.S., 232 U.S. 383, 34 S. Ct. 341
(1914);

Wolf v. Colorado, 338 U.S. 25, 69 S. Ct. 1359
(1949);

Kerr v. California, 374 U.S. 23, 83 S.Ct.
1623 (1963).

On these facts, it is also clear that Tickle was denied his constitutional right to have counsel.

There is no clear unequivocal waiver of counsel on these facts, and indeed there couldn't be as Tickle had counsel and the agents knew it all the time.

The final obvious point is that but for the search of Tickle's home, which we contend was illegal, there would not have been a confession.

VI

CONCLUSION

The appellants respectfully urge this court to reverse the convictions as to both appellants with orders that the case be dismissed.

Respectfully submitted,

SIMON, SHERIDAN, MURPHY,
THORNTON & MEDVENE

By: Thomas R. Sheridan
THOMAS R. SHERIDAN
Attorneys for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



THOMAS R. SHERIDAN

No. 21686
and
No. 21686-A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PEREA ROMERO,
RONALD EUGENE TICKLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

DEC 27 1967

WM. B. LUCK, CLERK

WM. MATTHEW BYRNE, JR.,
United States Attorney,

JO ANN I. DUNNE,
Assistant U. S. Attorney,
Chief Trial Attorney,

1200 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

DEC 28 1967

No. 21686
and
No. 21686-A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PEREA ROMERO,
RONALD EUGENE TICKLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,

JO ANN I. DUNNE,
Assistant U. S. Attorney,
Chief Trial Attorney,

1200 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I JURISDICTION AND STATEMENT OF THE CASE.	1
II STATUTE INVOLVED	3
III STATEMENT OF FACTS	4
1. FACTS AND CIRCUMSTANCES WITHIN THE AGENTS' KNOWLEDGE PRIOR TO ARREST OF DAVID ROMERO.	4
2. RECOVERY OF THE HEROIN DESCRIBED IN COUNT TWO.	11
IV ARGUMENT	14
A. ROMERO'S ARREST WAS BASED ON PROBABLE CAUSE.	14
B. ADMISSIBILITY OF VOLUNTEERED STATEMENTS OF DAVID ROMERO.	19
C. THE SEARCH WARRANT WAS VALIDLY ISSUED.	28
D. TICKLE'S VOLUNTARY CONFESSION WAS LEGALLY OBTAINED.	36
E. SUFFICIENCY OF THE EVIDENCE.	39
1) Count One	39
2) Count Two as to Appellant Romero.	41
3) Count Two as to Appellant Tickle.	42
CONCLUSION	44
CERTIFICATE	44

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Agobian and Egishian v. United States, 323 F. 2d 693 (9th Cir. 1963)	40
Beecher v. Alabama, 2 C. R. L. 3010 (Oct. 23, 1967)	23
Bell v. United States, 254 F. 2d 82 (D. C. Cir. 1958)	17, 18
Chin Kay v. United States, 311 F. 2d 317 (9th Cir. 1962)	31
Costello v. United States, 298 F. 2d 99 (9th Cir. 1962)	22, 23
Culombe v. Conn., 367 U. S. 568 (1961)	26
Cutchlow v. United States, 301 F. 2d 295 (9th Cir. 1962)	41
Davidson v. United States, 371 F. 2d 994 (10th Cir. 1966)	21
Draper v. United States, 358 U. S. 307 (1959)	14
Dyson v. United States, 283 F. 2d 636 (9th Cir. 1960)	42
Carlos Garcia v. United States, F. 2d ___, No. 21,084 (9th Cir., July 27, 1967)	18
Gilbert v. United States, 366 F. 2d 923 (9th Cir. 1966), cert. denied 87 S. Ct. 1961	34
Glasser v. United States, 315 U. S. 60 (1941)	39
Green v. United States, 282 F. 2d 388 (9th Cir. 1960)	39
Jones v. United States, 326 F. 2d 124 (9th Cir. 1963)	15

	<u>Page</u>
Klepper v. United States, 331 F. 2d 694 (9th Cir. 1964)	42
Lockley v. United States, 270 F. 2d 915 (D. C. Cir. 1959)	26
Mallory v. United States, 354 U. S. 449 (1957)	25, 26
McHenry v. United States, 308 F. 2d 700 (10th Cir. 1962)	22
Miller v. United States, F. 2d ___, No. 21,396 (9th Cir., August 30, 1967)	43
Miranda v. Arizona, 384 U. S. 436 (1966)	12, 20, 21, 37
Monetti v. United States, 299 F. 2d 847 (5th Cir. 1962)	17
Moody v. United States, 376 F. 2d 525 (9th Cir. 1967)	39
Newcomb v. United States, 327 F. 2d 649 (9th Cir. 1964), cert. denied 377 U. S. 944	19
People v. Pike, 48 Cal. Rptr. 575 (1965)	21
People v. Vallarta, 45 Cal. Rptr. 631 (1965)	21
Porter v. United States, 335 F. 2d 602 (9th Cir. 1964), cert. denied 379 U. S. 983	33, 34
Redmon v. United States, 355 F. 2d 407 (9th Cir. 1966)	18, 21, 39
Rivers v. United States, 270 F. 2d 435 (9th Cir. 1959), cert. denied 362 U. S. 920	17
Rodella v. United States, 286 F. 2d 306 (9th Cir. 1960)	39



	<u>Page</u>
Rosetti v. United States, 315 F. 2d 86 (9th Cir. 1963)	17
Rugendorf v. United States, 376 U. S. 528 (1964)	33
Stein v. United States, 346 U. S. 156 (1953)	23
Stroble v. United States, 343 U. S. 181 (1952)	23
Travis v. United States, 362 F. 2d 477 (9th Cir. 1966), cert. denied 385 U. S. 885	31, 34
United States v. Mitchell, 322 U. S. 65 (1934)	25, 26
United States v. Lloyd Thomas, et al., No. 21780, 9th Cir.	5
United States v. Ventresca, 380 U. S. 102 (1965)	35
Wong Sun v. United States, 371 U. S. 470 (1963)	21

Statutes

Title 18, United States Code, §3231	3
Title 21, United States Code, §174	1, 3
Title 28, United States Code, §1291	3
Title 28, United States Code, §1294	3



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PEREA ROMERO,
RONALD EUGENE TICKLE,

Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

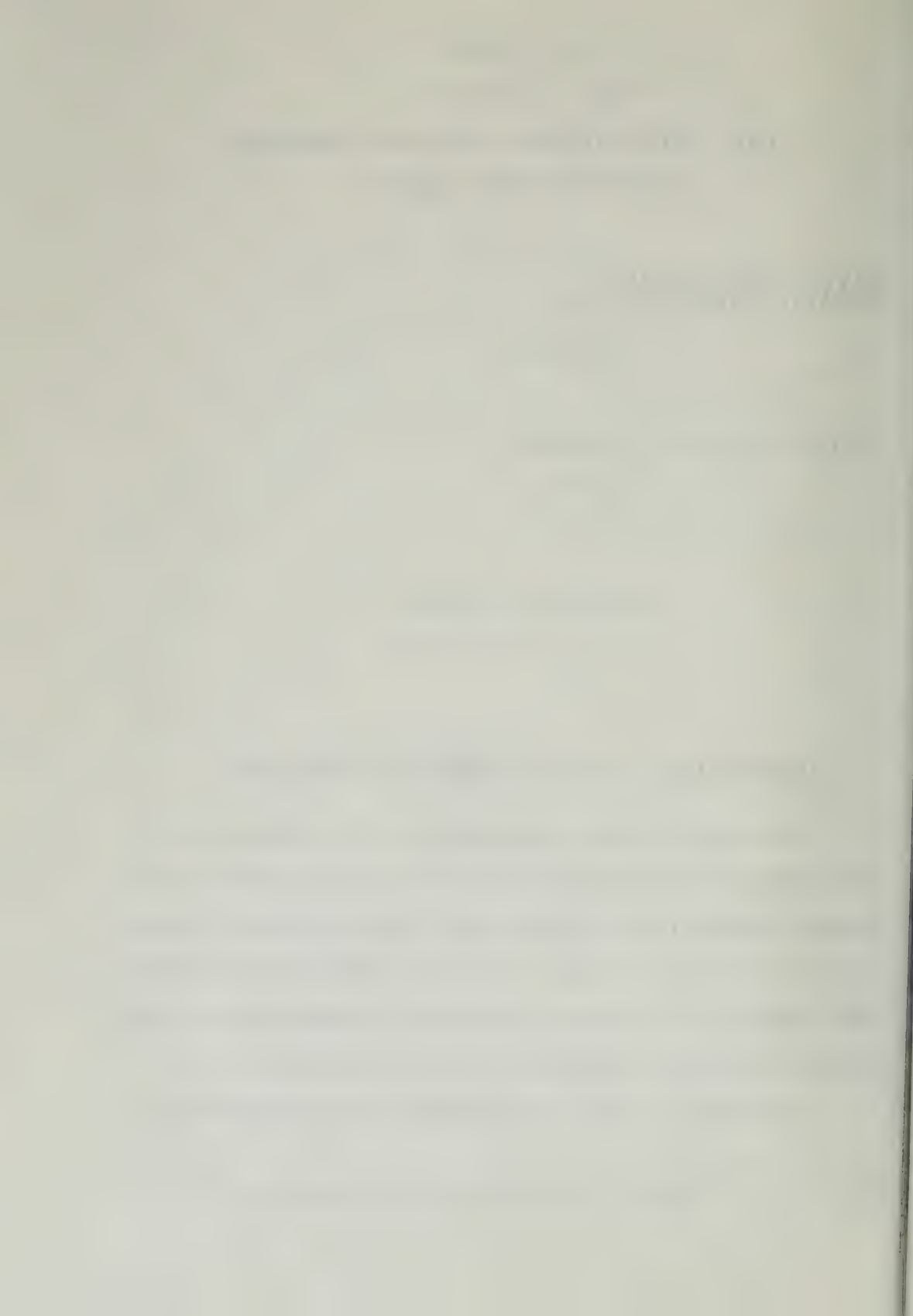
I

JURISDICTION AND STATEMENT OF THE CASE

On August 3, 1966, appellants David Perea Romero and Ronald Eugene Tickle were indicted by the Federal Grand Jury for the then Southern District of California, Central Division, in two counts, each of which alleged violations of Title 21, United States Code, Section 174. Appellant Romero was charged in both counts; appellant Tickle was charged only in Count Two [C. T. 2]. ^{1/}

On August 15, 1966, each appellant was arraigned and a

^{1/} "C. T. " refers to Clerk's Transcript of Record.



plea of not guilty was entered [C. T. 70].

Prior to trial, appellants moved for discovery and inspection [C. T. 18-23]; to suppress the evidence [C. T. 24-29]; and for severance [C. T. 30-34].

On October 5, 1966, the court ordered the appellants be severed for trial [C. T. 146].

On October 12 and 13, 1966, the court heard appellants' motion to suppress the evidence [C. T. 133], and the court denied the motions [R. T. 257]. ^{2/} Thereafter appellant Romero and the appellee agreed to waive jury and submit the matter to the court on the evidence presented at the hearing on the motion to suppress [R. T. 259]. Thus the case was tried without a jury before the Honorable Albert Lee Stephens, Jr., United States District Court Judge.

On October 26, 1966, the court found Romero guilty on both counts of the indictment [C. T. 156].

On October 27, 1966, appellant Tickle was tried without a jury before the Honorable Albert Lee Stephens, Jr., and on November 14, 1966, the court found appellant Tickle guilty [C. T. 181-182].

On November 14, 1966, appellant Romero admitted a prior Federal narcotics conviction and was sentenced to imprisonment for a period of 15 years on each count to commence and run concurrently [C. T. 174-175]. Appellant Romero filed a timely notice

^{2/} "R. T. " refers to Reporter's Transcript of Proceedings.



of appeal [C. T. 177, 184].

On December 12, 1966, appellant Tickle was sentenced to 5 years imprisonment [C. T. 183]. Appellant Tickle filed a timely notice of appeal [C. T. 185].

The jurisdiction of the District Court was predicated on Title 21, United States Code, Section 174 and Title 18, United States Code, Section 3231. This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought into the United States contrary to law . . . shall be imprisoned not less than 5 or more than 20 years, and in addition may be fined not more than \$20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug such possession shall be deemed

sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. "

III

STATEMENT OF FACTS

1. FACTS AND CIRCUMSTANCES WITHIN
THE AGENTS' KNOWLEDGE PRIOR TO
ARREST OF DAVID ROMERO.

Count One of the Indictment charged appellant David Romero alone; and, factually concerns the deposit of heroin by Romero in a public telephone booth on May 10, 1966.

Prior to this, the Federal Bureau of Narcotics had conducted an investigation initiated primarily by the receipt of three letters which described the current narcotics activity of David Romero. The letters were mailed to the Federal Bureau of Investigation at Los Angeles, who in turn forwarded them to the Federal Bureau of Narcotics. Each was in Spanish and signed with the name "Juan Sanchez", a person unknown to the Federal Bureau of Narcotics [R. T. 69]. The first letter was received by the Federal Bureau of Narcotics on October 4, 1965, and identified the narcotics violator as the David Romero, who was an ex-convict, with telephone number 356-1806 in Los Angeles [Ex. 1, R. T. 67-71].

The next two letters further identified the narcotics violator as the David Romero who had been incarcerated at McNeil Island, had been in an accident in Culiacan, Sinaloa, and had been in jail

the preceding week because some "hypnotic capsules were found on him" [R. T. 75-77].

Federal Bureau of Narcotics investigation proved this information accurately described appellant Romero [R. T. 70, 75, 77, 282].

Of major interest, the last two letters stated that "Manuel Areyano", of San Luis Rio Colorado, Sonora, Mexico, smuggled the narcotics into the United States for Romero [R. T. 71-72, 78]. The United States Customs Service verified that "Manuel Areyano" was suspected of smuggling narcotics into the United States from Mexico [R. T. 72]. 3/

During a surveillance on March 21, 1966, of the Tickle residence, owned by Romero, Federal Bureau of Narcotics Agents observed a Chevrolet parked in the driveway which was registered to Juana Arrellanes in San Luis Rio Colorado, Sonora, Mexico, and a Ford pick-up parked in front of the house which was registered to Manuel Arrellanes in San Luis - General Delivery [R. T. 73-75]. It is to be noted that in the Spanish language a double "LL" is pronounced "I". Thus "Arrellanes" is pronounced "Areyano" [R. T. 108].

The agents obtained from the telephone company a list of the long distance calls made from Romero's telephone for the six months preceding his arrest in the instant case. This disclosed that numerous calls were made to San Luis, Sonora, Mexico, to

3/ United States v. Lloyd Thomas, et al., No. 21780, pending before this Court, further describes "Manuel Areyano".

numbers registered to at least twenty individuals with prior narcotics convictions and to the residence of appellant Tickle [R. T. 72, 78-80, Ex. 1, R. T. 384]. An investigation of the calls made from Tickle's residence disclosed similar information [R. T. 87-88]. Illustrative, were the telephone calls to Charles "Snooky" Toliver, a narcotics felon, who had served time with Romero at McNeil Island. In the opinion of the Federal Bureau of Narcotics, Charles "Snooky" Toliver was the main narcotics supplier in the Oakland-San Francisco area [R. T. 87]. The Oakland Police Department related that in December, 1965, both appellants rented a car from the Avis Rental Agency at the San Francisco Airport [R. T. 88, 89, 91]. An informant of the San Francisco office of the Federal Bureau of Narcotics stated that on this occasion in December, Romero had delivered narcotics to Charles "Snooky" Toliver [R. T. 91]. The San Francisco Office of the Federal Bureau of Narcotics also reported that they had determined that appellants Romero and Tickle were in the Oakland area and observed in the vicinity of the residence of Charles "Snooky" Toliver on this occasion [R. T. 88]. In the confession of appellant Tickle, he admitted that appellants had delivered narcotics to Charles "Snooky" Toliver on several occasions and specifically stated that "Just before Christmas 1965, I drove Dave's 1966 Cadillac to Oakland with about twenty to thirty bricks of marihuana. I met Dave at the airport where I rented a 1965 Chevrolet, red in color from Avis. I used Dave's Bank of America Credit Card. We then drove both cars to a motel about a mile from Snooky's house.

We rented two adjoining rooms, #4 and 5. We took the marihuana from Dave's car and put it in the rented car. We stayed two days at the motel. The second day I noticed the rental car was gone. The day we left we went to Snooky's house and I saw the rented car there. We went in the house and Snooky was there. Snooky gave Dave a large amount of money that was in a cigar box." [Ex. 3, R. T. 400].

Further investigation revealed that although Romero was unemployed and had no legitimate source of income, he displayed affluence. He purchased a 1966 Cadillac for a total cash expenditure of approximately \$7,000. He owned at least four pieces of property, two of which he purchased in 1966 with down payments exceeding \$8,000 [R. T. 83-85].

During the four months preceding arrest, over 30 surveillances were maintained. The surveillances were initially limited to appellant Romero, but later expanded to include appellant Tickle's residence. This disclosed a pattern of Romero stopping at the Tickle residence prior to proceeding to his ultimate destination [R. T. 81-83, 115].

These facts led the agents to conclude that David Romero was actively trafficking in narcotics and was using Ronald Tickle's residence for the cache of narcotics [R. T. 119].

At approximately 5:20 P. M. , on May 10, 1966, agents of the Federal Bureau of Narcotics were maintaining surveillance in the area of appellant Tickle's residence. They observed the appellant David Romero arrive, enter the residence and exit at

approximately 6:05 P. M. [R. T. 92-94]. Tickle's car was parked near his residence [R. T. 92]. The Tickle residence is in the city of Sierra Madre [R. T. 116]. Thereafter three cars of agents followed David Romero as he drove to the city of El Monte. He passed through shopping areas where obviously other pay phones were located but he stopped at none until he reached Garvey Boulevard in the city of El Monte, where he parked his vehicle on the North side of the street [R. T. 316, 317]. Although Romero did not pass the phone booth at Garvey and Meeker Streets, he parked one and a half blocks away. Romero exited his vehicle, walking on the North side of Garvey Boulevard. He crossed La Madera Street, continued to the intersection of Meeker on the North side of Garvey. Romero crossed at this intersection to the South side of Garvey, proceeded to cross Meeker and enter a public telephone booth. While inside the telephone booth, Romero was observed by agents of the Federal Bureau of Narcotics. Romero did not place a telephone call. He did not deposit a coin in the coin box; he did not lift the telephone receiver; he did not look into the telephone directories. The sole act performed by David Romero within the telephone booth was a motion of his arm at the level of the counter which extended under the telephone [R. T. 167-168]. Thereafter David Romero exited the telephone booth, retraced his steps, entered his automobile, and sat observing the telephone booth. An agent was sent to check the telephone booth. When the agent entered the phone booth he found a package of heroin on the metal counter under the telephone. The agent exited the telephone booth

and waved his hands broadly in the pre-arranged signal indicating that he had located heroin. At this time David Romero started his vehicle and drove off. Simultaneously by radio message agents Watson and Saiz were notified to stop and arrest David Romero. David Romero drove West in a normal manner until the Federal Narcotics agents pulled beside his vehicle. The agent on the passenger side of the government vehicle had his car window open and was directly opposite David Romero. The window on the driver's side in David Romero's vehicle was open. The government agent yelled "Federal Narcotic Agents, pull over." and held his badge out the window. Romero nodded yes, and simultaneously stepped on the accelerator. He drove at excessive speeds for approximately three-quarters of a block, where he turned North on Meeker. In close pursuit was the government vehicle [R. T. 217]. Both vehicles raced to the corner of San Ignacio and Meeker where David Romero attempted to negotiate a right turn. Romero's car spun out of control and the engine died. Romero's car had skidded completely around and it was now facing the opposite direction from which he had been driving [R. T. 218]. The government vehicle stopped at the passenger side of Romero's car [R. T. 218]. Agent Saiz jumped from the passenger side of the government vehicle and ran to the driver's side of Romero's car. Saiz stated that Romero was under arrest for violation of the Federal narcotic laws [R. T. 209]. Romero attempted to start his car. The agent reached in the window to get the ignition keys. At this time Romero started the car and drove backwards, knocking the agent from the window.



Knowing that Agent Watson was somewhere at the rear of Romero's car, Agent Saiz then fired into the left front tire of Romero's Cadillac. Romero started fighting with Agent Saiz. During the struggle, Agent Saiz struck Romero with his gun. Romero continued fighting and it was necessary for Agent Watson to assist Agent Saiz in subduing Romero [R. T. 218-221]. After Romero was arrested, he was placed in the back seat of the Cadillac with Agent Watson and Agent Saiz drove the Cadillac approximately four blocks North on Meeker to a service station. During this drive appellant Romero was admonished that he did not have to make any statements; that any statements he made could be used against him in a court of law and that he was entitled to an attorney. Romero answered, "I know all that. I have been through it before." [R. T. 222]. At the service station Romero asked to speak to the agent in charge of the investigation [R. T. 190, 222]. Once again appellant Romero was admonished that he didn't have to say anything, anything he said could be used against him and that he had the right to an attorney. Romero stated he understood [R. T. 193]. The agent did not question appellant Romero. Other than the constitutional admonition all statements were made by appellant Romero. Romero stated he had had a premonition that he was going to be caught; that he was contemplating giving up selling junk; that he should have done it long before; he had stayed up nights thinking about getting caught by authorities and he was glad it was over. He said if we would be fair to him he would be fair to us. That the rest of the heroin was stashed at Tickle's residence

2. RECOVERY OF THE HEROIN
 DESCRIBED IN COUNT TWO.

After Romero's arrest, Agent Lipschutz left the El Monte area to drive to the Federal Building. He radioed his office to call the United States Commissioner and ask if he would agree to come down to the Federal Building [R. T. 132]. While preparing an affidavit for the search warrant, Agent Lipschutz received additional information regarding the telephone number at the booth where the heroin had been recovered, as well as appellant Romero's statement that the rest of the narcotics was at Tickle's residence from Agent Mendelsohn [R. T. 133]. After securing the search warrant, Agent Lipschutz drove to the Cloverly Street address of appellant Tickle where he met with other agents. Agent Lipschutz went to the door and knocked. Appellant Tickle came to the door. Agent Lipschutz stated, "Federal Agents, we have a search warrant for your residence." Appellant Tickle opened the door and invited the agents in. The search warrant was displayed and appellant Tickle, who was not under arrest at this time, was asked one question. "Do you have any money, valuables, narcotics or narcotic paraphernalia," to which he replied, "I'll show you where Dave keeps it." [R. T. 135]. Thereupon Tickle led the agents to several locations and no narcotics were found. Shortly, other agents arrived with appellant Romero. After they entered the residence Romero told

Tickle "I'm going to cooperate. I'm going to tell them where it is. Everything is going to be O.K." [R. T. 388]. Romero, Tickle and the agents then proceeded into the kitchen and Mr. Romero stated the package is under the sink. The agent then retrieved the package containing the heroin described in Count Two of the indictment [R. T. 388]. After this heroin was recovered, the agents arrested appellant Tickle [R. T. 411].

On May 11th each appellant was arraigned before the Commissioner and appellant Tickle was released on a \$2500 bond, personal surety [R. T. 517]. On August 3rd the indictment was returned and a bench warrant was issued. Bond was set in the amount of \$15,000 as to appellant Tickle and \$35,000 as to appellant Romero [R. T. 517].

That evening appellant Tickle was arrested and arrived at the offices of the Federal Bureau of Narcotics at approximately 7:30 P. M. [R. T. 392]. Tickle was fully advised of his Constitutional rights in compliance with Miranda v. Arizona, 384 U.S. 436 [Ex. 2, R. T. 394]. He stated that he understood and thereafter related his involvement in narcotics traffic [R. T. 395-397]. During the evening of August 3, 1966, there was no mention of bail or bond reduction [R. T. 434].

Tickle's oral confession of August 3, 1966, was placed in writing on August 4, 1966 and signed by Tickle at approximately 1:00 P. M. [R. T. 427, 434]. While the confession was being typed Tickle asked about his bond stating in substance that Romero was the only one who could give Tickle that much money and Tickle did

not want his cooperation known to Romero. The agent said he couldn't promise anything, but he would talk to the U. S. Attorney and see if a bond reduction would be possible [R. T. 529-531].

At approximately 2:30 P. M. , August 4, 1966, a court order was obtained reducing appellant Tickle's bond [R. T. 425].

IV

ARGUMENT

A. ROMERO'S ARREST WAS BASED ON PROBABLE CAUSE

"Probable cause exists when the facts and circumstances within [the arresting officers'] knowledge and of which they have had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

Draper v. United States, 358 U.S. 307 (1959).

David Romero was arrested at the corner of Meeker and San Ignacio on May 10, 1966 at approximately 6:40 P. M.

At the time of his arrest the agents knew:

- 1) An unidentified informer named Juan Sanchez stated Romero was trafficking in narcotics and "Manuel Areyano" was smuggling narcotics into the United States for Romero.
- 2) As previously described the identifying information given by the informant was investigated and found to be correct.
- 3) "Manuel Areyano" was known to the Bureau of Customs as a suspected narcotics smuggler.

- 4) Vehicles registered to Manuel Arellanes and Juana Arellanes were observed at the residence owned by Romero.
- 5) Romero had previously been convicted of possession of heroin.
- 6) Romero had been charged in San Diego with smuggling amphetamine tablets and 4 ounces of heroin located nearby his person. He was acquitted of the heroin offense but convicted of smuggling the drugs.
- 7) Another informant stated that Romero had delivered narcotics to Charles "Snooky" Toliver while Romero was at liberty on appeal bond from the San Diego conviction.
- 8) This information was corroborated by information from the Oakland Police Department, San Francisco Office of the Bureau of Narcotics and the telephone company records of calls from the Romero and Tickle residences to the residence of Toliver, as previously described.

Information from a reliable informant constitutes probable cause. An informant is reliable if he has given prior verified information or the instant information is corroborated.

Jones v. United States, 326 F.2d 124

(9th Cir. 1963).

- 9) On May 10, 1966, with access to a telephone at the

Tickle residence [R. T. 79] and other telephones in the commercial districts through which he passed after leaving Tickle's house, Romero drove to a phone booth at Garvey and Meeker. Although Romero did not pass the phone booth at Garvey and Meeker, he parked approximately one and a half blocks away, indicating a planned destination. This is reinforced in that Romero performed no normal or usual activity in the phone booth. He received no telephone call, he placed no telephone call, he did not look in the telephone directory. A movement of his hand in the area of the counter beneath the telephone was the only activity. Appellant returned to his car and sat watching the telephone booth.

- 10) Agent Downing was the next person to enter the phone booth and he found a packet of heroin in the exact area where the movement of Romero's hands were observed -- the counter under the phone.
- 11) When Agent Downing gave the signal indicating he had found narcotics, Romero who had been observing this activity, started his car and drove from the scene.
- 12) While driving beside Romero, Agents identified themselves as Narcotics Agents and directed Romero to stop. Although Romero heard this and nodded consent, he accelerated to high speeds, driving

hazardously in a desperate effort to escape. After his car spun out of control and was stopped, an agent identified himself as a Narcotic Agent, and Romero continued physically to resist arrest.

"Flight from law officers in evidence of guilt."

Monetti v. United States, 299 F.2d 847, 851

(5th Cir. 1962);

see also Rosetti v. United States, 315 F.2d 86

(9th Cir. 1963);

Rivers v. United States, 270 F.2d 435

(9th Cir. 1959), cert. denied 362 U.S. 920.

In Bell v. United States, 254 F.2d 82 (D.C. Cir. 1958),

police officers saw the defendant and another man pull away from the curb in front of a store and drive two blocks without lights at 3:30 A.M. When stopped, officers observed forty cartons of cigarettes on the back seat of the car. When the officer inquired where they got the cigarettes, defendants answered "at a place in Maryland". One defendant then made a motion to reach under the seat. The officer ordered both men out of the car and placed them under arrest for housebreaking. At the time of the arrest, the officers did not know that the crime of housebreaking and larceny had in fact occurred. The Circuit Court held the officers had reasonable grounds to believe a felony had been committed and that the men in the car had committed it, therefore the arrest was valid. The court specifically noted that the events must be viewed as

sudden and unanticipated circumstances and that certain facts may indicate probable cause to an experienced officer which would be meaningless to another. This holding is applicable to the instant case. The Narcotic Agents were in surveillance. They did not pre-arrange the setting. Moreover they had greater facts and knowledge than the officers in Bell, supra. The agents knew Romero was a narcotics felon. The agents knew that two separate informants had described Romero's narcotics involvement. The agents knew that information supplied by the informants had been corroborated.

On cross-examination, appellant's counsel asked the agent who had recovered the heroin from the phone booth. ". . . Agent Downing, based upon your experience [7 years] as a federal narcotics agent, what did you assume that the defendant Romero might be doing when he walked into the phone booth and then walked out again?" The reply was . . . "Based on previous investigation, sir, I assume he was placing heroin there." [R. T. 182-183].

Based on the totality of information then available added to the recovery of heroin from the phone booth and the flight of appellant Romero, there was probable cause for the arrest of David Romero.

Carlos Garcia v. United States, ____ F. 2d ____

#21, 084 (9th Cir. 7/27/67);

Redmon v. United States, 355 F. 2d 407

(9th Cir. 1966);

B. ADMISSIBILITY OF VOLUNTEERED
STATEMENTS OF DAVID ROMERO

On two separate occasions appellant Romero volunteered admissions inculcating himself as to both counts One and Two. The first statement occurred approximately four blocks from the scene of his arrest at a gas station. Appellant asked to see the agent in charge, who was an agent other than the arresting officer. The agent in charge responded to appellant Romero's request and advised appellant in substance that anything he said could be used against him and that he had the right to an attorney. The appellant stated he understood his rights. This meeting was initiated at the request of appellant. Without questioning or any other prompting Romero stated: "He had a premonition that he was going to get caught; that he was contemplating giving up selling junk [heroin]; that he should have done it long before but he had stayed up nights thinking about this getting caught by authorities; and he was glad it was over. He said that if we were fair with him, he would be fair with us. That the rest of the heroin was stashed at Tickle's residence." [R. T. 193, 194].

The second statement was at the residence of appellant Tickle. Here again appellant Romero was not interrogated by the Agent. In fact the statement by appellant Romero was primarily

made to appellant Tickle as follows: "I'm going to cooperate. Everything is going to be O. K. I'm going to show them where it is." [R. T. 99]. Then Romero told the agents "the package is up under the sink" [R. T. 386-388].

Appellant's first contention is that these statements are inadmissible because of the lack of an adequate admonition of constitutional rights within the requirement of Miranda v. Arizona, 384 U. S. 436. The warnings were legally adequate at the time given but not legally adequate at the time of trial. Ironically, Romero stated in effect that he knew his rights because he had been through it before [R. T. 222]. Moreover, Romero did not need to have counsel appointed.

"In dealing with statements obtained during interrogation, we do not purport to find all confessions inadmissible The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that the police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." [emphasis added]

Miranda v. Arizona, 384 U.S. 436, 478 (1966).

As to the first statement in the instant case, it is clear that Romero called the agent of his choice. It was Romero's desire to volunteer information. Romero's statement was not solicited by the agents. There was no interrogation by the agent. All of these facts are equally applicable to his second statement with the addition that most of the second statement was not even made to an agent but was a statement of assurance made to a co-defendant. Romero's direction to look under the sink merely was cumulative and corroborative of his first statement that the rest of the heroin was in Tickle's house.

Clearly both statements should be admissible for all purposes for the reason that " . . . it is apparent that such statement was unresponsive, spontaneous and voluntarily made by the appellant for his own reasons and was not elicited by the interrogation of the agents".

Redmon v. United States, 355 F.2d 407, 409
(9th Cir. 1966);

See also: Davidson v. United States,
371 F.2d 994 (10th Cir. 1966);

People v. Pike, 48 Cal. Rptr. 575 (1965);

People v. Vallarta, 45 Cal. Rptr. 631 (1965).

The second ground urged for holding statements inadmissible is that they are fruits of the illegal arrest within the holding of Wong Sun v. United States, 371 U.S. 470 (1963). However, as previously presented, the arrest was legal, being based on probable cause.

The third contention of appellant is that the first statement of Romero is inadmissible for the reason that it was involuntary. The basis for this argument is that force was necessary to effect the arrest.

"The test to determine the voluntary or involuntary character of admissions or a confession is whether the accused, at the time he made them, is in possession of 'mental freedom' to confess or deny a suspected participation in the crime. . . . In order to arrive at such a determination it is necessary to look at and consider all the facts and circumstances surrounding the making of the admission or confessions."

McHenry v. United States, 308 F. 2d 700, 703
(10th Cir. 1962).

In Costello v. United States, 298 F. 2d 99, 100 (9th Cir. 1962), "force was employed to the extent that appellant was struck on the head with the policeman's side arms and became so saturated with blood that the jailers refused to admit him when he was presented for incarceration". This Court held that the use of such force did not render invalid the arrest and concurrent search. When "without provocation other than the very announcement of arrest, appellant charged and began to grapple with the officers in an effort to escape. The officers were justified in using such force as under the circumstances was reasonably necessary to effect the

arrest or prevent the escape of appellant." Costello, supra, at p. 100.

It is clear that a confession or statement is inadmissible if it is the product of physical force, threats of physical force or psychological coercion.

Beecher v. Alabama, 2 C. R. L. 3010 (Oct. 23, 1967).

In Stein v. United States, 346 U. S. 156 (1953), the defendant suffered physical violence during the course of his arrest. However the court held that the confessions were not obtained by this physical violence, placing particular emphasis on the fact that one of the defendants decided for himself with whom he would negotiate and the quid pro quo for which he would confess thus clearly indicating he was in control of himself and his statement was voluntary. In Stroble v. United States, 343 U. S. 181 (1952), there was physical violence associated with the arrest. However the court noted that there was a break in time between the arrest and confession. That there was no demand that the defendant implicate himself and that in fact the defendant was anxious to confess. Thus the confession was not the result of coercion.

These holdings are applicable to the instant case. There was a break in time between the arrest and the first statement of appellant Romero. There was a difference in the place of arrest and the place of the first statement of Romero. The physical force was only that necessary to effectuate the arrest. It was not a coercion to secure statements or admissions. There was no interrogation of appellant Romero. It was his personal decision to speak. The



statement was made at his request. He decided for himself with whom he would talk, which was a person other than the arresting officers and he stated the quid pro quo, that is, be fair with me and I'll be fair with you. For these reasons it is apparent that the district court judge's finding is correct. Appellant's statement was not the result of any force. The appellant was not young, impressionable or easily led. He had "been through it before" and was capable of handling himself, in the circumstances of the instant case.

The last point raised as the basis for alleged inadmissibility of both of Romero's statements is unnecessary delay in arraignment. A chronology of events is important. Appellant Romero's arrest occurred at approximately 6:40 P. M. on May 10, 1966. Shortly thereafter Agent Lipschutz of the Federal Bureau of Narcotics left the vicinity of the arrest in El Monte to drive to the Federal Building to see if he could contact the United States Commissioner and obtain a search warrant. The United States Commissioner did not hold office after 4:00 P. M. [R. T. 41]. Appellant Romero's first statement was made four blocks from the scene of the arrest and obviously while Agent Lipschutz was driving from El Monte to the downtown area. At the time Agent Lipschutz was driving to the Federal Building he did not know if the United States Commissioner would leave his residence to come to the Federal Building for the purposes of issuing the search warrant. The entire circumstances indicate that at best the agents were merely hopeful of securing a warrant. Appellant Romero's first statement was made prior to the issuance of the search warrant and clearly prior to any knowledge

on the part of the agent that the United States Commissioner would be willing to return to the Federal Building. (Part of the statement is contained in the Affidavit.)

Appellant Romero's volunteered statement made shortly after arrest is admissible as a "threshold statement".

"The duty enjoined upon arresting officers to arraign 'without unnecessary delay' indicates that the command does not fall from mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible to verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession. "

Mallory v. United States, 354 U.S. 449, 454-455 (1957).

In the instant case there was no delay for the purposes of interrogating the defendant, indeed, there was no interrogation of the defendant. The defendant solicited the right to see the agent in charge and without questioning volunteered admissions of guilt.

In United States v. Mitchell, 322 U.S. 65 (1934), the defendant was arrested at his home and driven by the police to the precinct station. Within a few minutes of his arrival at the station the defendant admitted guilt. He was subsequently held for 8 days before arraignment. The court held that his admissions at the police



station were properly received in evidence and not effected by the subsequent illegal detention of eight days.

As recently as 1961, Mr. Justice Frankfurter, the author of the Mitchell and Mallory opinions said:

" . . . Of course, our decision in United States v. Mitchell . . . makes clear that confessions made during the period immediately following arrest and before delay becomes unlawful are not to be excluded under the rule. "

Culombe v. Conn. , 367 U.S. 568, 599 (1961).

The second statement of appellant Romero is also admissible. This statement at Tickle's house was not the result of interrogation by officers, it was a statement made primarily to a co-defendant, volunteered by appellant. That portion of the statement directing the agents to the heroin was volunteered by Romero. It was corroborative and cumulative of the first statement. Romero had already told the agents that heroin was in Tickle's house. The Trial Judge stated the agents would probably have the heroin without Romero's statement [R. T. 369]. The entire purpose of the drive to the Tickle residence was a valid method of intelligent and effective law enforcement. That is, to secure narcotic contraband and verify the story volunteered by appellant Romero.

In Lockley v. United States, 270 F.2d 915 (D.C. Cir. 1959), the defendant orally confessed 15 minutes after his arrest. Thereafter the officer drove the defendant to various scenes of the crimes.

Lockley was arrested at approximately 4:30 A. M. At approximately 9 A. M. officers began typing a written confession which the defendant signed. He was not arraigned until approximately 1:45 P. M. on the same date. The court held both the confession after arrest and the later written confession were admissible.

"When we accept a threshold utterance of an accused who spontaneously and promptly tells the police that he 'shot a man', it places too much stress on common sense to say that we should exclude his more detailed statement concerning the event made shortly thereafter. Some reasonable latitude must be allowed the police officers working under stress with situations and problems which are inherently charged with emotional elements and circumstances not conducive to the calm reflective processes available in ex post facto evaluation at the appellate stage. *Perry v. United States*, 347 F.2d 813, 815-816 (D. C. Cir. 1964)."

C. THE SEARCH WARRANT WAS VALIDLY
ISSUED.

Each appellant contends the search warrant is invalid. As a first ground, they state the inclusion of part of Romero's statements made after arrest should cause the entire warrant to fail. As previously stated this volunteered statement was admissible for all purposes and the argument will not be repeated here.

As a second ground they contend failure to set forth probable cause and proceed in a hypertechnical manner to examine bits and pieces of the affidavit, discovering such alleged errors as:

- 1) we do not know whose affidavit is attached.

The Affidavit for Search Warrant contained the signature of Irving Lipschutz of the Federal Bureau of Narcotics as the affiant. The appended affidavit, which greatly exceeded in length the space available on the printed form, identifies itself as "Affidavit prepared by Agent Irving Lipschutz of the Federal Bureau of Narcotics on May 10, 1966."

- 2) Lack of candor in identifying Juan Sanchez as a "Mexican National".

Agreed, this is not an established fact. However, it is a reasonable conclusion that a person named Juan Sanchez, who mails letters from Mexicali, Baja California, written in Spanish although addressed to citizens of the United States,

is a Mexican National.

- 3) Overstated and Inaccurate to state that "calls to" twenty persons with narcotic convictions were made from the Romero residence.

The numbers called were registered in the names of twenty different persons who were of record with the Federal Bureau of Narcotics and who had narcotic convictions. They were completed telephone calls rather than unanswered calls. One of the numbers was registered to Charles Toliver. Another informant states Romero had delivered narcotics to Toliver which was corroborated by the car rental and the fact that Romero had been seen in the vicinity of the Toliver residence. A reasonable conclusion that they were "calls to" said persons.

- 4) The statement that Toliver received his narcotic supply "that day from the person in the rented vehicle" is valueless.

The search warrant was issued because there was reason to believe that heroin was located in the Tickle residence. The fact that an informant said Toliver received narcotics on a specified date from "the person in the rented vehicle" has great value, because "the person" was Tickle. This informant and information was credible because an independent investigation corroborated that on that

date Tickle rented a vehicle, in that city, using Romero's credit card. Romero expressly authorized this use of the credit card. Another informant stated Romero is involved in narcotics. Independent investigation showed frequent telephone calls from the Romero residence to the Tickle residence. Surveillance showed Romero proceeded from his residence to the Tickle residence and then to various areas. When Romero deposited the heroin in the phone booth, he had just come from the Tickle residence. Romero said the heroin was in the Tickle residence. Thus information that Tickle was involved in narcotics with Romero on a separate occasion, is relevant.

- 5) It is not true that Manuel Arellanes is the person mentioned in the letters from Juan Sanchez.

Agreed, Juan Sanchez stated that Manuel "Areyno" of San Luis Rio Colorado, Sonora, Mexico, smuggled narcotics into the United States for Romero. "Areyno" is a phonetic spelling of "Arrellanes" as pronounced in Spanish. It is reasonable to conclude that Manuel Arrellanes of San Luis Rio Colorado, Sonora, Mexico is Manuel "Areyno" of San Luis Rio Colorado, Sonora, Mexico.

- 6) It is not true that Romero "appeared" to leave

something near the phone.

The affiant was actually conservative in this statement. Romero did not "appear" to leave something; rather he did in fact leave something [heroin] near the phone.

- 7) Affiant did not see Romero, but another agent did.

The last paragraph clearly indicates the information was derived from the personal observation of agents of the Federal Bureau of Narcotics. Affiant is justified in giving credence to fellow agents. Chin Kay v. United States, 311 F. 2d 317 (9th Cir. 1962).

- 8) Fails to disclose the time Romero entered the phone booth.

The last paragraph states all observed actions of Romero from 5:20 P. M. on May 10, 1966. Failure to specify the time of each action is without merit. Travis v. United States, 362 F. 2d 477 (9th Cir. 1966), cert. denied 385 U.S. 885.

- 9) It is not true that Agent Downing "retrieved a tin foil package which contained heroin (field test)."

This is true. Agent Downing did recover the heroin. Agent Downing observed a Marquis Reagent test performed in the field which showed a positive reaction [R. T. 170-171]. The affidavit does not state that Agent Downing performed the field test.

There is no basis in fact for appellants' conclusion that the field test was performed after the search warrant was secured.

- 10) It is an unfounded conclusion by an absent affiant that "Romero observed this".

The affiant was present in the area of the phone booth. He did not observe Romero but through radio communications learned of Romero's actions [R. T. 93-94]. After exiting the phone booth, Romero sat in his car. Romero started his car at the same time Agent Downing waved his hand to signal the recovery of heroin. It is a reasonable conclusion that "Romero observed this" [R. T. 216].

- 11) It is not clear what Romero observed.

Perhaps technically the affiant improperly positioned his nouns and pronouns. However a common sense reading of the two sentences shows that Romero observed Agent Downing recover the heroin.

- 12) "Left hurriedly" is vague.

Clearly the reader knows that after Romero saw an agent recover the heroin Romero had deposited, Romero left the scene in other than a leisurely, carefree manner.

- 13) It is inaccurate to state that Romero attempted to "flee on foot".

Appellee agrees Romero did not "flee on foot". His flight was by car. In Rugendorf v. United States, 376 U.S. 528 (1964), there were two inaccuracies in the affidavit for search warrant which were held immaterial since affiant was not the source of the information and there was no bad faith. This reasoning is applicable to the instant case. Clearly there was no willful or deliberate misrepresentation by the affiant.

- 14) Romero's statement that "heroin was in Tickle's home" does not establish that heroin was then and there in Tickle's house.

Romero had just placed heroin in a phone booth. Romero was trafficking in heroin. It is reasonable to conclude that Romero had an accessible supply of heroin. Romero had just come from the Tickle house. In effect, Romero stated his supply was in Tickle's house.

"The standard applied by the magistrate is not that of certainty that the objects sought will be found as a result of the search." Porter v. United States, 335 F.2d 602, 604 (9th Cir. 1964), cert. denied 379 U.S. 983.

- 15) Romero is not a credible informant.

The agents had independently determined the association of Romero and Tickle. Romero and

Tickle had previously been involved in narcotics transactions with Charles Toliver. Romero had just come from Tickle's house, when Romero deposited heroin in the phone booth. Moreover, Romero was an admitted participant in the crime he had just committed and the crime he was reporting. There was a substantial basis for crediting the information from Romero. Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966), cert. denied 87 S.Ct. 1961.

Appellants have asked this Court to apply technical requirements of elaborate specificity in reviewing this search warrant. Yet this Court has already stated in Porter v. United States, 335 F.2d 602, at 604 (9th Cir. 1964), cert. denied 379 U.S. 983.

"We have no inclination to study the affidavit of a police officer, applying for a warrant, as if it were a pleading prepared by counsel in a lawsuit. The policeman makes his statement in his own unprofessional language and the magistrate determines whether the substance of it shows probable cause for the search. "

In Travis v. United States, 362 F.2d 477 (9th Cir. 1966), cert. denied 385 U.S. 885, this Court upheld a search warrant which was based primarily on information from an unidentified

source that the defendant had previously transported heroin on trips of similar flight patterns. Neither the affiant or his unidentified source had personal knowledge that defendant was in possession of narcotics at the time in question. The instant affidavit contains a substantially stronger showing of probable cause. In addition to the other information concerning Romero, Tickle and narcotics, the agents had just recovered narcotics which one logically concludes had also been transported from the Tickle residence to the phone booth.

"Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

United States v. Ventresca, 380 U.S. 102, 109 (1965).

Appellee submits the instant affidavit clearly establishes probable cause.

D. TICKLE'S VOLUNTARY CONFESSION
 WAS LEGALLY OBTAINED

Appellant Tickle contends his confession was improperly received in evidence and as a first ground alleges the confession is the product of the illegal search of his home. As previously presented the search was pursuant to a search warrant properly issued and the argument will not be repeated here.

As a second ground Tickle contends the confession was obtained by denying him his right to counsel. Tickle was represented on May 11, 1966 by Mr. Sherman for the "preliminary only, first presentment" [R. T. 540-541]. The agents were not advised that Mr. Sherman represented Tickle thereafter [R. T. 522, 524]. Prior to interviewing Tickle on August 3, 1966, the agents stated:

"Well, Mr. Sherman appeared for you at the Commissioner's hearing.

"He stated, 'I haven't seen him since the Commissioner's hearing here. And he's not my attorney now.'

"What do you mean by that.

"He said, 'He cannot help me. Dave pays him all the money. What can he do for me?'

" 'Is he your attorney now?'

"He said, 'No'.

"I said, 'Do you have an attorney?'

"He said, 'No.' " [R. T. 397].



The agents advised Mr. Tickle of his constitutional rights and gave Mr. Tickle a printed form titled "Warning of Rights Prior to Interview" which he was observed to read. Tickle stated he understood. This admonition fulfills the requirements of the Miranda decision, supra [Ex. 2, R. T. 394-395]. Mr. Tickle then related the facts which was later placed in written form and signed by Tickle on August 4, 1966 [R. T. 434]. On August 4, 1966, prior to preparing the written confession, the agents asked if he still wanted to cooperate and repeated the Constitutional Warning [R. T. 398, 404]. Tickle stated he understood Mr. Sherman telephoned on August 4, 1966, at approximately 11:00 A. M., and requested that the agents stop interviewing Tickle. The agents did stop [R. T. 519-520, 508-509, 528]. When Mr. Sherman arrived at the office of the Federal Bureau of Narcotics, he was taken into the front office and Mr. Tickle was brought in. In response to Mr. Sherman's questions, Tickle said that he was not represented by Mr. Sherman [R. T. 444, 511, 521]. On August 15, 1966 a designation of counsel and appearance praecipe was failed with the court showing that Mr. Sherman represented Tickle [R. T. 542]. On October 10, 1966 Mr. Sherman requested a continuation of trial to allow Tickle to secure other counsel. Mr. Sherman stated there was a conflict of interest between Tickle and Romero and that Mr. Sherman had been aware from the inception of the case that he could not and would not represent Tickle. In addition, Mr. Sherman stated he had told Tickle on numerous occasions to consult other counsel [R. T. 22, 27]. Appellant Tickle was represented by other counsel at his trial.

Appellant Tickle was never denied his right to counsel. He was properly advised of his right to counsel and affirmatively waived it. The attorney does not choose the client. The agents properly relied on Tickle's waiver to Mr. Sherman's representation.

Appellant Tickle did not move to suppress his confession [R. T. 246]. At trial the defense questioned the voluntariness of the confession [R. T. 479-481, 559]. Did the second arrest and discussion of bond reduction constitute an inducement which forced the confession. The District Court Judge, as trier of the facts held:

"Well, I think not. All things taken into consideration, I think not. But irrespective of the confession, I think the evidence is sufficient to convict the defendant.

"He was aware that he was keeping packages at least. There is from his own testimony on the stand that he was keeping packages in his house for Mr. Romero, and Romero would go in and out of that place from time to time and take these packages and apparently kept them there with Mr. Tickle's consent.

"The other circumstances of the case indicate to me that he knew what was in those packages, that is, that they were contraband. I think that he knew what they contained. He was willing to show it. His testimony in court, while not as detailed and as

complete as his confession, indicated, I think,
that he was clearly guilty of the offense charged.

"So I find him guilty as charged."

[R. T. 605-606].

Appellant Tickle has failed to establish that his confession
was not voluntary.

Redmon v. United States, 355 F.2d 407
(9th Cir. 1966).

E. SUFFICIENCY OF THE EVIDENCE

The Government respectfully submits that the evidence is
sufficient to sustain the verdict. Especially is this true when this
Court, as it must, considers the evidence and inferences that can
be drawn therefrom most favorably to the Government.

Glasser v. United States, 315 U.S. 60 (1941);
Moody v. United States, 376 F.2d 525 (9th Cir. 1967).

1) Count One

Proof of possession of narcotics may be shown by circum-
stantial evidence only.

Green v. United States, 282 F.2d 388 (9th Cir. 1960).
A present or past possession of heroin is sufficient.

Rodella v. United States, 286 F.2d 306 (9th Cir. 1960).

All of the facts regarding Romero's trip to the telephone booth, his actions within the telephone booth, the heroin recovered from the telephone booth and his efforts to escape from the narcotics agents support the reasonable inference that at the time of Romero's arrest, he had had possession of the heroin in the telephone booth.

In Agobian and Egishian v. United States, 323 F. 2d 693 (9th Cir. 1963), officers were pursuing the defendants who were attempting to escape by car. An object was thrown from defendant's car and the sound of the glass breaking was heard. Later officers recovered broken glass and heroin in a metal jar lid along the route of defendants' attempted escape. The Court held the defendants had had possession of the heroin recovered in the street.

This evidence standing alone would sustain the conviction. But in addition there is the admissible volunteered statement by Romero shortly after arrest which identifies himself as the person who placed the narcotics in the phone booth.

"When at the approach of the officers, the jar containing the heroin was thrown out of the window of appellant's residence, it was shown that a moment earlier someone had had possession of narcotics. In the absence of explanation showing the possession to be lawful it was presumed unlawful under 21 U. S. C. A. Section 174. Thus the corpus delicti of the offense charged was fully established prior to and independent of the statements of appellant [which identified appellant

as the prior possessor of the heroin]. "

Cutchlow v. United States, 301 F. 2d 295, 297
(9th Cir. 1962).

2) Count Two as to Appellant Romero.

In like manner, the fact that Romero had just left the Tickle residence, he had delivered the heroin described in Count One, the heroin in Count Two was recovered at the Tickle residence owned by Romero, added to his statement shortly after arrest that "the rest of the heroin was stashed at Tickle's residence", is sufficient to sustain the conviction in Count Two [R. T. 193]. There is the additional evidence that later Romero told Tickle "I am going to show them where it is" and then Romero told the agents the heroin was hidden under the kitchen sink [R. T. 99].

Finally, appellant Romero testified in his own behalf primarily as to his arrest. In addition, Romero denied his incriminating statements. He denied telling the agents that the rest of the heroin was at Tickle's residence [R. T. 272, 280]. Romero denied telling the agents at Tickle's residence, that the heroin was under the sink [R. T. 273]. However, Romero failed to deny or explain his trip to the telephone booth, the heroin found in the telephone booth, his flight from the area of the phone booth or the heroin found at the Tickle residence.

This failure to deny or explain incriminating facts already in evidence may be considered adversely to Romero by the trier



of the facts.

Dyson v. United States, 283 F. 2d 636 (9th Cir. 1960);
Klepper v. United States, 331 F. 2d 694 (9th Cir.
1964).

3) Count Two as to Appellant Tickle

When Romero deposited the heroin in the phone booth he had just come from the Tickle residence. Tickle and his family were the sole residents at the Cloverly Street address. Romero resided at a different location [R. T. 468]. When agents were admitted into the Tickle residence they asked one question, "if he had any narcotics, weapons, or any narcotic paraphernalia or valuables in the residence. Whereupon Mr. Tickle said, 'I'll show you where Dave keeps it.' " [R. T. 387]. Tickle was not under arrest at this time. At his trial, Tickle admitted this statement but denied that he was referring to narcotics [R. T. 471]. However, it is clear that Tickle meant where "Dave kept the narcotics". At this time, the agents hadn't mentioned David Romero. Thereafter Tickle tried to mislead the agents by showing them locations other than the true hiding place of the heroin, until Romero told Tickle that he was going to cooperate [R. T. 387]. Then Tickle accompanied Romero to the kitchen and Romero told the agents the heroin was under the sink.

At trial Tickle admitted storing packages for Romero [R. T. 471]. Tickle admitted that on August 3, 1966, he told the agents he

had been helping Romero in his narcotic business since July 1965 [R. T. 467]. Tickle admitted telling the agents the information contained in his written confession [R. T. 490]. Tickle did not deny the facts contained in his oral and written confessions.

Tickle also testified that at the time he gave his confessions, he knew he was under indictment and was going to be prosecuted [R. T. 492]. No promises were made concerning prosecution or any possible sentence [R. T. 492-493].

The District Court Judge, as trier of the facts stated, "But irrespective of the confession, I think the evidence is sufficient to convict the defendant." [R. T. 605].

Since reasonable minds could find that the evidence excludes every reasonable hypothesis but that of guilt, appellee submits that the verdict must be sustained.

Miller v. United States, ____ F.2d ____, No. 21,396
(9th Cir. August 30, 1967).

CONCLUSION

For the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR. ,
United States Attorney,

JO ANN I. DUNNE,
Assistant U. S. Attorney,
Chief Trial Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Jo Ann Dunne

JO ANN DUNNE

NO. 21686
NO. 21686-A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PEREA ROMERO and RONALD EUGENE TICKLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANTS' REPLY BRIEF

SIMON, SHERIDAN, MURPHY,
THORNTON & MEDVENE

625 South Kingsley Drive
Los Angeles, California

Attorneys for Appellants.

FILED

JAN 16 1968

WM. B. LUCK, CLERK

JAN 15 1968

NO. 21686
NO. 21686-A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PEREA ROMERO and RONALD EUGENE TICKLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANTS' REPLY BRIEF

SIMON, SHERIDAN, MURPHY,
THORNTON & MEDVENE

625 South Kingsley Drive
Los Angeles, California

Attorneys for Appellants.

TOPICAL INDEX

	<u>Page</u>
I	
Jurisdiction	1
II	
Statement of Facts	1
III	
Argument	7
A. Romero's arrest was not based on probable cause	7
B. Admissibility of Romero's statements .	11
C. The search warrant is legally invalid .	15
D. Tickle's confession is inadmissible . .	17
E. The evidence is insufficient to sustain the verdicts	18
IV	
Conclusion	18

TABLE OF AUTHORITIES CITED

<u>Cases</u>	<u>Page</u>
Beckett v. U.S., 379 F.2d 863 (9th Cir.1967) . . .	18
Davis v. U.S., 382 F.2d 211 (9th Cir.1967) . . .	18
Hill v. U.S., 379 F.2d 811 (9th Cir.1967).	18
Mallory v. U.S., 354 U.S. 449 (1957)	13
Miranda v. Arizona, 384 U.S. 436, 478 (1966) . . .	12, 13
Porter v. U.S., 335 F.2d 602 (9th Cir.1964). . . .	16
Taglavore v. U.S., 271 F.2d 262 (9th Cir.1961) . .	11
Wong Sun v. U.S., 83 S.Ct. 407, 371 U.S.	
471 (1963)	9, 11

NO. 21686
NO. 21686-A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PEREA ROMERO and RONALD EUGENE TICKLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF

I

JURISDICTION AND STATEMENT OF THE CASE

Appellants and appellee are in agreement on these subjects.

II

STATEMENT OF FACTS

Appellants take serious issue with appellee's statement of facts. It is well done, but it does not constitute a statement of facts. It is an ill-disguised, extremely argumentative discourse, laden with conclusions, and as such is misleading. The opening sentence is illustrative as it says that Count One of the Indictment

"factually concerns the deposit of heroin by Romero in a public telephone booth on May 10, 1966." Appellee's entire brief takes on this same tone - that appellants are guilty and now we must be bothered by showing how the proof of their guilt satisfies the sticky, hyper-technical requirements of the law as set down by appellate courts.

There are numerous serious constitutional questions involved in this case, and appellee does not aid the quest for solutions by the assertion of the infallibility of their conclusion, which is being challenged on numerous constitutional grounds.

Appellee's technique is to assume that a fact is established and then repeat it over and over again. This Court should not be deceived by this tactic. For example, on page 4, appellee twice states that two totally anonymous letters "identified the narcotics violator" as Romero. This technique, whether subtle or not, should be exposed.

These three totally anonymous letters can never be elevated into anything more than investigative leads. Nothing appellee says about them will convert them into evidence of guilt or evidence of probable cause to arrest. Anonymous hearsay cannot be partially corroborated and then relabeled probable cause; the corroboration itself must constitute the probable cause in such situations

The "Areyano - Arrellanes" names, as tortuously presented by appellee as being the same name, is an invitation to scorn. Appellee in a statement of facts states that a double "LL" is pronounced "I" in Spanish; therefore, these names are the same. Appellee's cited authority is the testimony of Agent Irving Lipschutz, who testified that this is what Spanish-speaking agents told him [R.T. 108]. Hardly expert testimony, but even if it is true it does not account for the double "RR" in one name and the single "R" in the other, or the "O" ending in one name and the "ES" ending in the other name. Appellee offers no explanation of the fact that Arrellanes is Romero's wife's maiden name [R.T. 75], or that the person or persons who caused this problem was the Spanish-writing, anonymous "Juan Sanchez."

All of the statements about telephone calls being made are hearsay. Not one telephone record was produced as an exhibit in court. An agent testified that he examined telephone records (which were not produced) and he was able to determine that "Romero was calling individuals, who are of record in our office files ..." [R.T. 80]. Absenting a wire-tap, and appellants have no evidence of any in this case, it is impossible to examine telephone toll records of calls made from a given telephone number and conclude who was calling on that telephone and who answered the telephone.

The attempt by appellee to elevate multiple hearsay opinion testimony into facts or probable cause is apparent in reference to Charles Toliver. An agent is testifying about information that was relayed to him which originated from an unknown informant whose reliability is totally unknown and whose basis of information is never given, and this is offered as probable cause. Appellee blithely states (p.6) that "an informant of the San Francisco office of the Federal Bureau of Narcotics stated that ..." and a citation to the transcript is given. The truth of the matter is that a Los Angeles agent testified that he had been told over the telephone by agents in San Francisco (unidentified) that an informant (unidentified) had told them ...[R.T. 91]. The point is made.

Appellee, under the heading of "Facts and Circumstances Within the Agents' Knowledge Prior to Arrest of David Romero," discusses (p.6-7) the contents of Tickle's confession which was obtained almost three months after Romero's arrest.

Appellee mentions that over thirty surveillances were maintained on Romero in the four months prior to his arrest, and concludes that these surveillances "disclosed a pattern of Romero stopping at the Tickle residence prior to proceeding to his ultimate destination" (p.7). This is mere words served up with a sinister

suggestion. What does "ultimate destination" mean? The plain facts are that even though Romero was under surveillance for months, the agents never acquired a single shred of evidence of any wrongdoing on his part. Appellee would intimate that finding nothing means there is something there and this is the fatal defect to pre-conceived conclusions.

Appellee suggests in the statement of facts that if a person leaves a place that has a telephone and passes many available telephones and then enters a telephone booth, this means that the person had a reason for picking a particular telephone. Not only is this not a fact but it would make every daily occurrence suddenly suspect.

Appellee states (p.8) that "The sole act performed by David Romero within the telephone booth was a motion of his arm at the level of the counter which extended under the telephone [R.T. 167-168]." Not only does the citation fail to support this statement, but it is erroneous and incomplete. Appellants set forth in their opening brief (p.20-21) all of the actual testimony on this subject as well as the trial court's summary that the agent "could not see what he did with his hands." It is important to note that "a motion of his arm" is of no value as it tells a trier of fact nothing. It would be peculiar if a person didn't move his arms but held them

rigidly at his sides.

Appellee states a number of times that when the agent entered the phone booth he found a package of heroin (p.8,9). This is not accurate within the framework of this case. The agent, at the most, found a tin foil package containing a powder of unknown substance. For all he knew then and there it could have been plain milk sugar. The point is that the agents at the time of arrest did not know what they had in the tin foil package.

The factual circumstances of the arrest and beating of Romero were contraverted during the trial. Two disinterested witnesses were at the scene and their testimony contradicts the agents. Mrs. Zimmer testified that once Romero's car spun around and stopped it never moved again [R.T. 238-239]; and after the agent shot out the tire, Romero started to get out of his car and he got one leg out when the agent began hitting Romero with something [R.T. 234-235]. Manuel F. Alger testified that he observed the entire incident, and after the agent shot out the tire the agent hit Romero with his gun, and that there was no fight or struggle but the agent just hit him and he could hear the sound of the blow [R.T. 240-242]. Mr. Alger also testified that once Romero's car spun to a stop it never moved again [R.T. 243].

Appellee sets forth no facts relative to Romero's physical condition after being smashed over the head with

a gun.

Regarding Tickle's bond reduction after his second arrest, appellee states (p.12) that "during the evening of August 3, 1966, there was no mention of bail or bond reduction." This is not so. Agent Lipschutz testified on direct examination that he discussed bond reduction with Tickle immediately after Tickle's arrest on the evening of August 3, 1966 [R.T. 529,532]. Appellee also states that Tickle's bond reduction was mentioned on August 4, 1966, while the confession was being typed (p.12), suggesting or implying that this was the first time the subject was raised on August 4, 1966. This is not so. On August 4, 1966, after Agent Lipschutz took Tickle from the jail, the very first thing he did was to make arrangements to reduce Tickle's bail and this was prior to any typing of the confession [R.T. 426, 529].

III

ARGUMENT

A. Romero's arrest was not based on probable cause.

Appellee sets forth twelve points and contends they add up to probable cause. Appellants' opening brief deals with these points in detail and this argument will not be repeated. If we stop after appellee's eighth point and ask does this add up to probable cause that Romero

put narcotics in a telephone booth on May 10, 1966, there is only one possible answer: No. These first eight points at the most form a basis of suspicion or a reason to investigate. Appellee's error is to treat "probable cause" as if it has an independent existence, which it doesn't. The actual test is whether there is probable cause to believe a specific crime has been committed. The probable cause aspect must be connected to a crime.

Appellee's eighth point is not clear as it starts off by saying: "This information was corroborated by information ..." (p.15). What information was corroborated? Is it appellee's position that the informant "Juan Sanchez" is an informant that has been corroborated by independent investigation so that his allegations now constitute a probable cause? This is factually not so because a six-month investigation and over thirty surveillances did not corroborate the allegations of criminal conduct. This is also legally impossible because his allegations in September of 1965 have nothing to do with narcotics in a telephone booth in May of 1966. The crime for which the government must establish they had probable cause to arrest anyone had not been committed. These same observations are true as to the informant in San Francisco. There is not a single shred of evidence that indicates that this informant

is reliable or that he has any basis for his conclusion.

The agents did not attempt to secure an arrest warrant, and no explanation is offered for this failure. The agents had had Romero under surveillance for six months; they knew him, his habits, his home, his relatives, his telephone, his cars, his past, and his finances. They could have waited and chemically tested the powder, and checked the tin foil for fingerprints. They normally wait in such circumstances to see who comes to the booth next. It is suggested that they didn't wait here because they did not see Romero place anything in the booth.

The Supreme Court in Wong Sun v. U.S., 33 S.Ct. 407, 371 U.S. 471 (1963), in affirming this Court's determination that an arrest lacked probable cause, said:

"It is conceded that the officers made no attempt to obtain a warrant for Toy's arrest. The simple fact is that on the sparse information at the officers' command, no arrest warrant could have issued consistently with Rules 3 and 4 of the Federal Rules of Criminal Procedure, 18 U.S.C.A. Giordenello v. United States, 357 U.S. 480, 486, 78 S.Ct. 1245, 2 L.Ed.2d 1503. The arrest warrant procedure serves to insure that the deliberate, impartial

judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause. Cf. Jones v. United States, 362 U.S. 257, 270, 80 S.Ct. 725, 4 L.Ed.2d 697. To hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy."

If appellee has probable cause to arrest Romero for narcotics in the telephone booth on May 10, 1966, it comes from appellee's points 9 through 12 (p.15-17). Briefly stated, these points amount to the fact that Romero went into a telephone booth which had not been previously searched or watched, did not make a telephone call, and an agent then went into the booth and found a tin foil package under the telephone, which contained a powder. It was then that the agents decided to arrest Romero. It was then that they had to have probable cause that Romero had placed this powder in the booth. Appellant submit that the requisite probable cause was lacking.

Tin foil will take and hold fingerprints. Romero's fingerprints are not on the tin foil.

Appellee asserts that flight from law officers is evidence of guilt and the cases hold that the flight of an accused is evidence of consciousness of guilt. But this is not to say that it is probable cause, particularly where the conduct is ambiguous as it is here. In Wong Sun (supra) the Supreme Court affirmed this Court's decision that Toy's flight from narcotic agents did not constitute probable cause for his arrest. See particularly footnote 10 (p.415) of the Supreme Court's decision where it is stated: "... we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime."

See also Taglavore v. U.S., 271 F.2d 262 (9th Cir. 1961).

Probable cause to arrest a person for a specific crime depends on the facts and circumstances in each case, and appellants submit that in this case there was no probable cause to arrest Romero.

B. Admissibility of Romero's statements.

It appears that appellee basically confesses error on this point, as appellee states: "The warnings [given to Romero after his arrest] were legally adequate at the time given but not legally adequate at the time of trial" (p.20). These legally inadequate warnings render Romero's statements inadmissible for any and all

purposes including in the search warrant and as a part of the probable cause to arrest.

Appellee attempts to avoid the legal conclusion of inadmissibility by saying the statements were volunteered to the agent at the gas station. Appellee would ignore the chronology. Romero was not arrested at the gas station; he was slugged, handcuffed with his hands behind his back, put into the back seat of his own car, given an admitted inadequate warning, driven four blocks to a gas station, and then spoke to the agent in charge who also gave him an admitted inadequate warning. He was then kept prisoner for several hours without being taken before the Commissioner while an agent went to the Commissioner and secured a search warrant. Then he was taken into Tickle's home and made statements there that appellee would characterize as volunteered.

Appellee's quote from Miranda v. Arizona, 384 U.S. 436, 478 (1966), obviously does not apply to the instant facts. Romero did not walk into the agents' offices and confess. A trier of fact is obligated to consider the character of the testimony, the surrounding circumstances, the motive of a witness, the inherent logic of the testimony, and it taxes credulity to accept that the agent in charge gave Romero a warning and then Romero, handcuffed and bleeding, blurted out a confession

and the agent never asked a question.

The cases cited by appellee (p.21) are pre Miranda cases and are distinguishable on the facts.

Appellee apparently concedes that if Romero's arrest was illegal then any statements attributed to him would be inadmissible for all purposes.

Although the evidence as to whether it was necessary for the agents to beat Romero over the head with a gun is in sharp conflict, there is no conflict over the facts that Romero was beaten and bled profusely. A man in this shape who is then put in a car with his hands cuffed behind his back is not generally in either physical or mental condition to freely and voluntarily confess. Appellee had and has the burden of proving that Romero's statements were freely and voluntarily made, and there was a total failure of proof. This entire area of the law is, of course, further complicated by the Miranda decision in that it must be determined if even an adequate warning was heard and comprehended by a beaten and bleeding man.

Appellee's attempts to avoid the mandate of Mallory v. U.S., 354 U.S. 449 (1957) fly in the face of the plain facts that an agent present at the scene of the arrest went to a United States Commissioner and secured a search warrant in which post arrest statements of the arrestee were used, but the arrestee was not brought

before the same Commissioner. Once the agent knew that the Commissioner would hear the agent couldn't the agent have utilized the same radio to tell the other agents to bring in Romero for arraignment. Of course he could have, but he didn't want Romero arraigned. Why didn't the Commissioner order the agent to bring Romero before him immediately? Why didn't the agent in charge send Romero in with the agent who was to seek out the Commissioner? The answers to these questions permit only one conclusion: Romero was denied his right of prompt arraignment.

Appellee suggests that Romero's statement at the gas station is merely a "threshold statement," but the facts are to the contrary.

Appellee also strains credulity by suggesting that Romero's statements several hours after his arrest and while he was in Tickle's home were volunteered and were merely corroborative and cumulative. Are they also threshold statements? Patently not. They were statements made by an arrestee hours after his arrest, who had not been arraigned before a Commissioner who was available. And these same statements were used to convict Romero of separate and distinct offense (Count Two), so how can they be corroborative or cumulative of statements relative to a different offense.

C. The search warrant is legally invalid.

Appellee's confession of error, that the agents did not give Romero a legally adequate warning but then used a statement obtained from him as part of their probable cause to secure a search warrant, should be determinative of this point in appellants' favor.

Although the trial court indicated that it felt that Romero had no standing to object to the search warrant [R.T. 262-263], appellee does not pursue this point and obviously concedes that Romero has standing. Insofar as the trial judge sustained the search warrant on grounds that Romero had no standing to object, the trial court of course must be reversed.

Appellee's answer to the specification of error that the search warrant is legally defective on its face is to charge appellants with being hypertechnical and of applying technical requirements of elaborate specificity. Yet appellee admits that a number of defects do exist in the search warrant. Appellee's analysis of other alleged defects in the search warrant is shallow as it assumes the existence of the facts that must be proven and attempts to explain mistakes of fact by saying they were "reasonable conclusions."

Appellee offers no explanation or argument for the wrong dates appearing on both the search warrant and the affidavit for the search warrant. Nor does appellee

comment on: (1) the failure to state that the anonymous letters were received six months before the application for the search warrant; (2) the failure to reveal that Romero was Tickle's landlord and that Romero and Tickle were related; and (3) that Romero's wife was an "Arrellanes

Appellee states (p.29) that the informant regarding the Toliver allegation was credible because corroborated. This is wishful thinking. In the affidavit for the search warrant not only is there no corroboration offered but there is no basis given for the informant's opinions. If a person had narcotics in Oakland, California in December, this is of no value in ascertaining if he has narcotics in Los Angeles the following May. The test is whether there is probable cause that there are narcotics at a certain location now.

Appellee states (p.30) that it is reasonable to conclude that Manuel Arrellanes is Manuel Areyano, which is really farfetched, but even this does not explain the factual falsity in the affidavit.

Appellee's quotation from Porter v. U.S., 335 F.2d 602 (9th Cir. 1964), about an affidavit prepared by a police officer without the assistance of counsel only serves to emphasize the gravity of the defects in the instant search warrant, because here there was assistance of counsel. Agent Lipschutz testified he met with Assistant United States Attorney John

Van de Kamp [R.T. 132] and Mr. Van de Kamp's initials appear on the bottom of the search warrant [C.T. 51].

It is worth noting that appellee quotes a case for the proposition that doubtful cases should be resolved in favor of warrants because the law prefers warrants, but why not apply this same proposition to Romero's arrest. He was arrested without a warrant.

D. Tickle's confession is inadmissible.

Appellee's answer to the charge that Tickle's confession was obtained by denying Tickle's right to counsel is to state that Tickle waived counsel. When a person has been arrested and has had a judicial proceeding at which he has counsel who has filed an appearance, it is thereafter up to a court to determine if counsel has been discharged. It is certainly not the function or duty of an agent in such circumstances to decide that counsel has been substituted out and the person is his own lawyer.

Why did the agents re-arrest Tickle if not to question him in the absence of his counsel, which is exactly what happened.

Appellants, in their opening brief, specified and argued that Tickle's confession should be held inadmissible because of appellee's tactics which denied Tickle due process. Nowhere does appellee respond to this argument. This silence can only be interpreted

as an agreement with appellants' position.

E. The evidence is insufficient to sustain
the verdicts.

Appellee argues that there is a reasonable inference that Romero had had possession of the narcotics found in the telephone booth. This is not so. At the very most the government evidence shows that Romero was in a phone booth in which narcotics were subsequently found. No one ever saw any narcotics in Romero's possession; no one even saw a package in his possession. Appellee's cases are easily distinguished.

Three very recent cases from this court are quite pertinent.

Hill v. U.S., 379 F.2d 811 (9th Cir. 1967);

Beckett v. U.S., 379 F.2d 863 (9th Cir. 1967);

Davis v. U.S., 382 F.2d 221 (9th Cir. 1967).

In each of these cases the conviction was reversed because the government had failed to prove that the appellant had possession of the narcotic. The Davis case is very much in point and as applied to the instant case the fact that the telephone booth had not been searched before Romero entered it seems to be conclusive that this case must be reversed.

IV

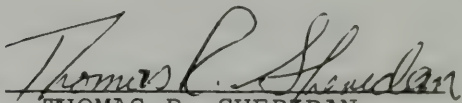
CONCLUSION

Appellants respectfully urge this Court to

reverse the convictions with directions to dismiss the indictment.

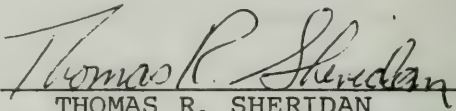
Respectfully submitted,

SIMON, SHERIDAN, MURPHY,
THORNTON & MEDVENE

By: 
THOMAS R. SHERIDAN
Attorneys for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


THOMAS R. SHERIDAN

NO. 21687

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM LYLE BOYLE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
MICHAEL D. NASATIR,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 91803

FILED

SEP 18 1967

WM. B. LUCK, CLERK Attorneys for Appellee,
United States of America.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM LYLE BOYLE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
MICHAEL D. NASATIR,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 91803

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	iii
I STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION	1
II STATUTE INVOLVED	3
III QUESTIONS PRESENTED	4
IV STATEMENT OF THE FACTS	4
V ARGUMENT	9
A. THE DISTRICT COURT PROPERLY ADMITTED DOCUMENTARY EVIDENCE SEIZED BY STATE AUTHORITIES PUR- SUANT TO SEARCH WARRANTS WHERE APPELLANT HAD NO INTEREST EITHER IN THE PREMISES SEARCHED OR THE PROPERTY SEIZED.	9
1. Previous Suppression of Documentary Evidence By the California State Court is Irrelevant, Since the Federal Court Must Make an Independent Inquiry Under Federal Standards of Admissibility.	9
2. Under Federal Law, Appellant Does Not Have the Requisite Standing to Object to Evidence Obtained Through Search and Seizure by State Authorities of Premises and Property Possessed, Owned, and Controlled By Another Person.	11
3. Under Federal Law, the Search and Seizure Were Lawful.	17
a. The Affidavit in Support of the Applications For Search Warrants Set Forth Suf- ficient Probable Cause.	17
b. The Items To Be Seized Were Described With Sufficient Particularity.	20

	<u>Page</u>
B. STATEMENTS OF APPELLANT MADE TO STATE AGENTS INVESTIGATING ANOTHER PERSON FOR A STATE OFFENSE UNRELATED TO A FEDERAL CRIME WERE PROPERLY ADMITTED INTO EVIDENCE.	22
CONCLUSION	25
CERTIFICATE	27

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Aday v. Superior Court, 55 Cal. 2d 789 (1961)	20
Byars v. United States, 273 U. S. 28 (1927)	10
Davis v. United States, 226 F. 2d 331 (6th Cir. 1955), cert. denied 350 U. S. 965, Reh. denied 351 U. S. 915	14
Diaz-Rosendo v. United States, 357 F. 2d 125 (9th Cir. 1966)	14, 15, 16, 17
Elkins v. United States, 364 U. S. 206, 4 L. Ed. 2d 1669 (1960)	10, 11
Escobedo v. State of Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964)	22, 23, 24, 26
Hill v. United States, 374 F. 2d 871 (9th Cir. 1967)	11, 16, 17
Jones v. United States, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960)	12, 17
Kohatsu v. United States, 351 F. 2d 898 (9th Cir. 1965), cert. denied 384 U. S. 1011	24
Marron v. United States, 275 U. S. 192 (1927)	21
Mathes v. United States, 376 F. 2d 595 (5th Cir. 1967)	24
Miller v. United States, 354 F. 2d 801 (8th Cir. 1966)	22, 23
Nathanson v. United States, 290 U. S. 41 (1933)	17
Rickey v. United States, 360 F. 2d 32 (9th Cir. 1966)	25

	<u>Page</u>
Selinger v. Bigler, 377 F. 2d 543 (9th Cir. 1967)	25
Smith v. United States, 321 F. 2d 427 (9th Cir. 1963)	11, 20
Stanford v. Texas, 379 U. S. 476 (1965)	20, 21
Travis v. United States, 362 F. 2d 477 (9th Cir. 1966)	18
United States v. Fiore, 258 F. Supp. 435 (D. C. W. Penn. 1966)	24
United States v. Mancuso, 378 F. 2d 612 (4th Cir. 1967)	25
United States v. Ventresca, 380 U. S. 102 (1965)	18, 20

Constitution

United States Constitution:

First Amendment	21
Fourth Amendment	16, 17

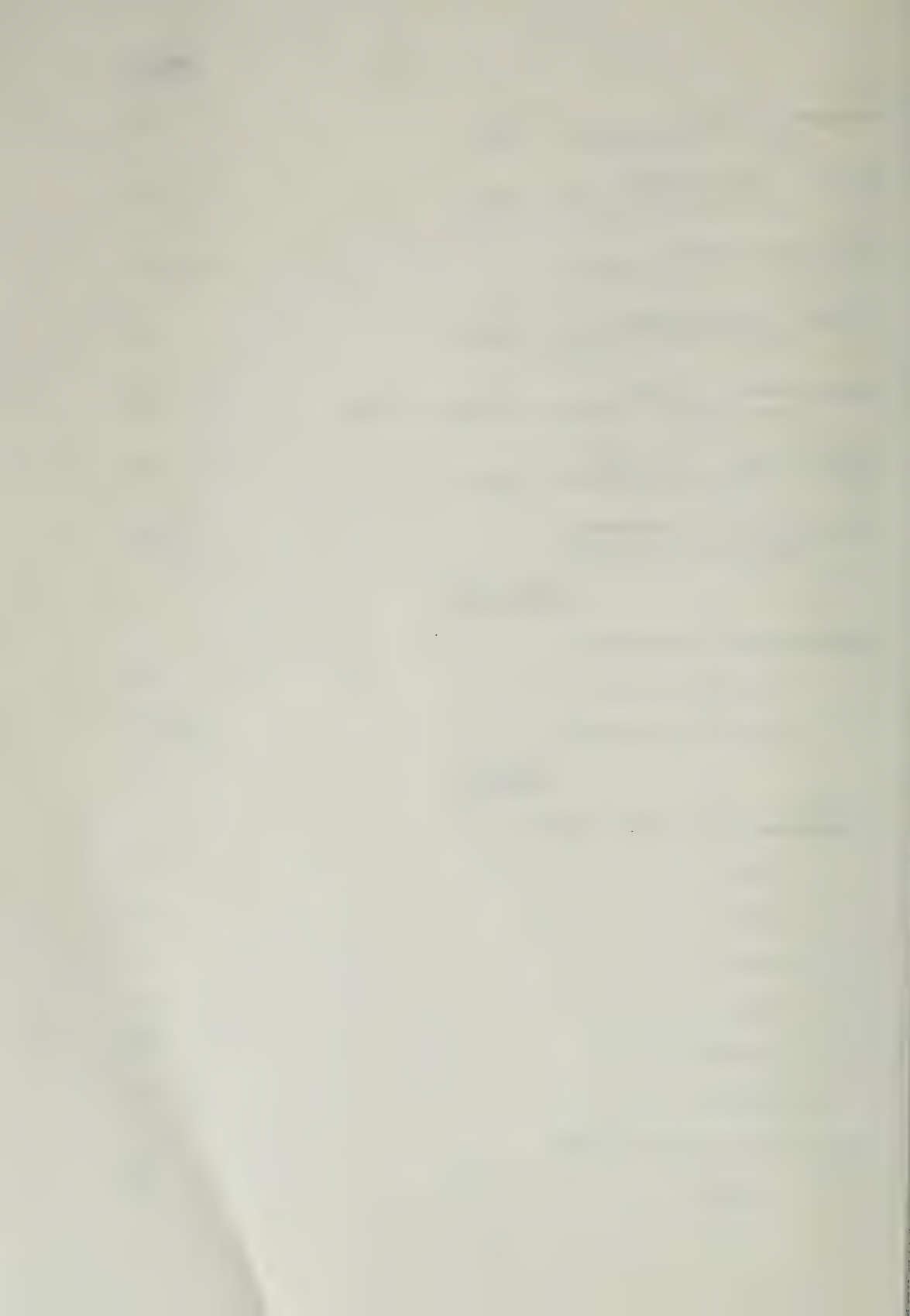
Statutes

California Commercial Code:

§3201	14
§3301	14
§3302	14
§3305	14
§3417(2)	13
§3605(a)	14

Uniform Commerical Code:

§3-201	14
--------	----



	<u>Page</u>
Uniform Commercial Code (Continued):	
§3-301	14
§3-302	14
§3-305	14
§3-417(2)	13
§3-605(a)	14
Title 18, United States Code, §3231	3
Title 26, United States Code, §7206(1)	1, 3
Title 28, United States Code, §1294(1)	3

Rules

Federal Rules of Criminal Procedure:

Rule 37(a)	3
Rule 41(e)	2, 11, 17

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM LYLE BOYLE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND
FACTS DISCLOSING JURISDICTION

On March 16, 1966, the Federal Grand Jury for the Southern District of California returned an indictment in four counts charging appellant with violation of Title 26, United States Code, Section 7206(1). Counts One and Two alleged that appellant wilfully and knowingly filed an income tax return for the years 1959 and 1960 in his and his wife's name and verified by the appellant's written declaration that they were made under the penalties of perjury. These counts further charge that appellant did not believe these returns to be true and correct as to every material matter, in that

he had received income additional to that stated in the returns in the form of fees from Edwin L. Barkley and Barkley Pipeline Construction, Inc , in the amounts of \$9,975.47 and \$9,472.04, respectively. Counts Three and Four charge that appellant filed amended returns for the years 1959 and 1960 with declarations that they were being made under the penalties of perjury, and which the appellant did not believe to be true and correct as to every material matter in that he had received income additional to that stated in the amended returns in the form of fees from Edwin L. Barkley and Barkley Pipeline Construction, Inc., in the same amount stated above [C. T. 2-6]. ^{1/}

On April 4, 1966, appellant was arraigned and pleaded not guilty to all counts [C. T. 7].

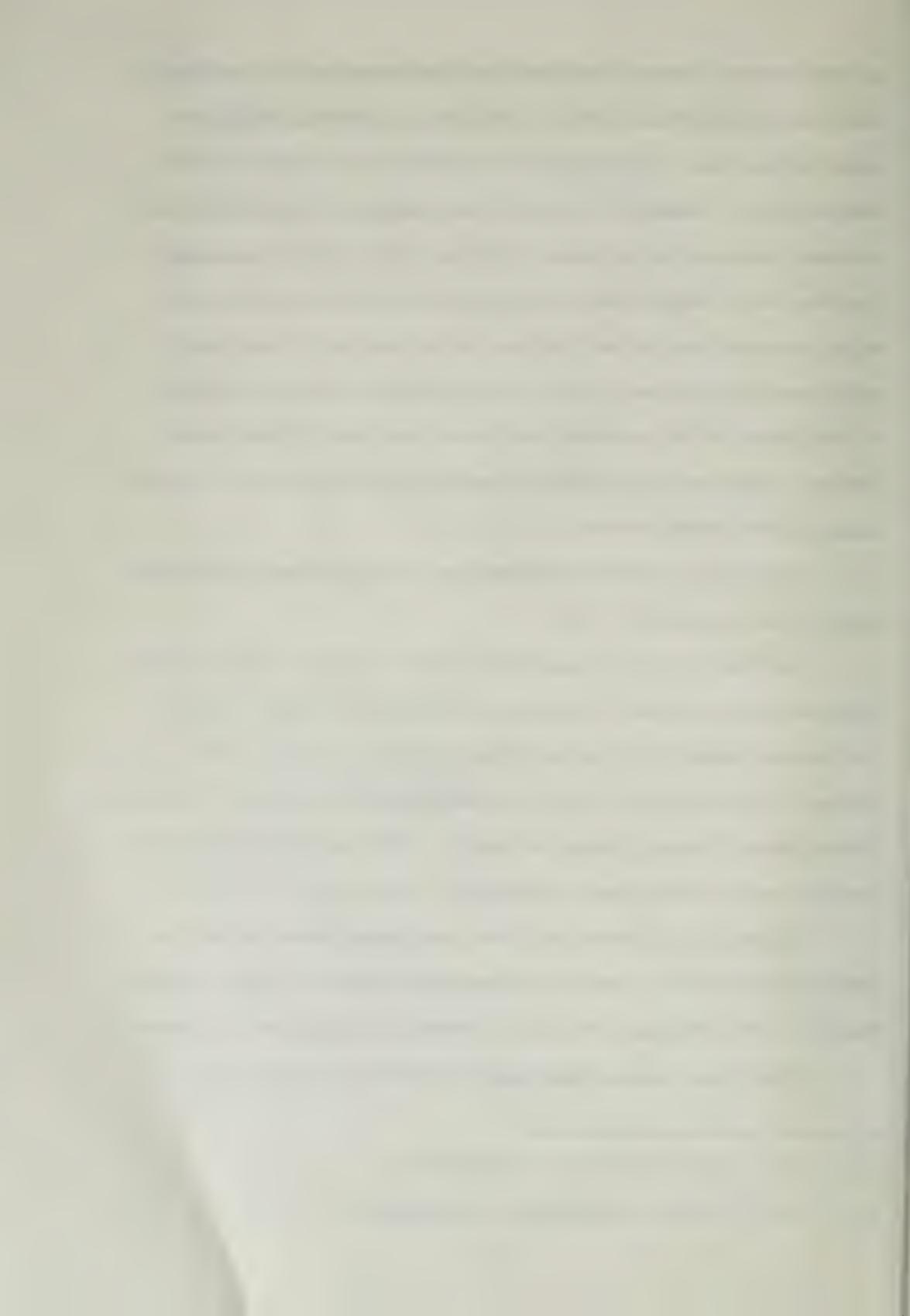
On May 13, 1966, appellant filed a motion to dismiss the indictment and motion to suppress evidence under Rule 41(e) of the Federal Rules of Criminal Procedure [C. T. 8-55]. The motion to suppress was denied by the Honorable Francis C. Whelan, United States District Judge on May 23, 1966 and again denied by the trial judge at the time of trial [C. T. 123; R. T. 10-11]. ^{2/}

On May 23, 1966 a jury trial was commenced before the Honorable Russell E. Smith, United States District Judge, and on May 24, 1966, the jury returned a verdict of guilty on all counts.

The Court denied appellant's motion for a new trial on

^{1/} C. T. refers to Clerk's Transcript.

^{2/} R. T. refers to Reporter's Transcript.



July 11, 1966. On this date appellant was sentenced by the court to the custody of the Attorney General for a period of one year on each of Counts One, Two, Three and Four, to begin and run concurrently. Execution of the sentence was suspended on the condition that he be confined in a jail-type institution for a period of 90 days, and placed on probation for the remainder of the term imposed [C. T. 127]. On July 20, 1967, appellant filed a timely notice of appeal [C. T. 128].

Jurisdiction of the District Court was based on Title 18, United States Code, Section 3231 and Title 26, United States Code, Section 7206(1). Jurisdiction of this Court is based on Title 28, United States Code, Section 1294(1) and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

Title 26, United States Code, Section 7206(1) provides in pertinent part as follows:

"Any person who

"(1) willfully makes and subscribes any return

. . . which contains or is verified by a written

declaration that it is made under the penalties of

perjury, and which he does not believe to be true

and correct as to every material matter; . . .

shall be guilty of a felony. . . ."

III

QUESTIONS PRESENTED

A. Does appellant having standing to object to a search and seizure of premises and property which he does not own, control or possess?

B. Was the evidence obtained by state authorities pursuant to a search warrant issued by a state judicial officer lawfully seized and therefore properly admitted into evidence?

C. Were statements made by appellant to state authorities in the Board of Directors' office of his employer properly admitted into evidence?

IV

STATEMENT OF THE FACTS

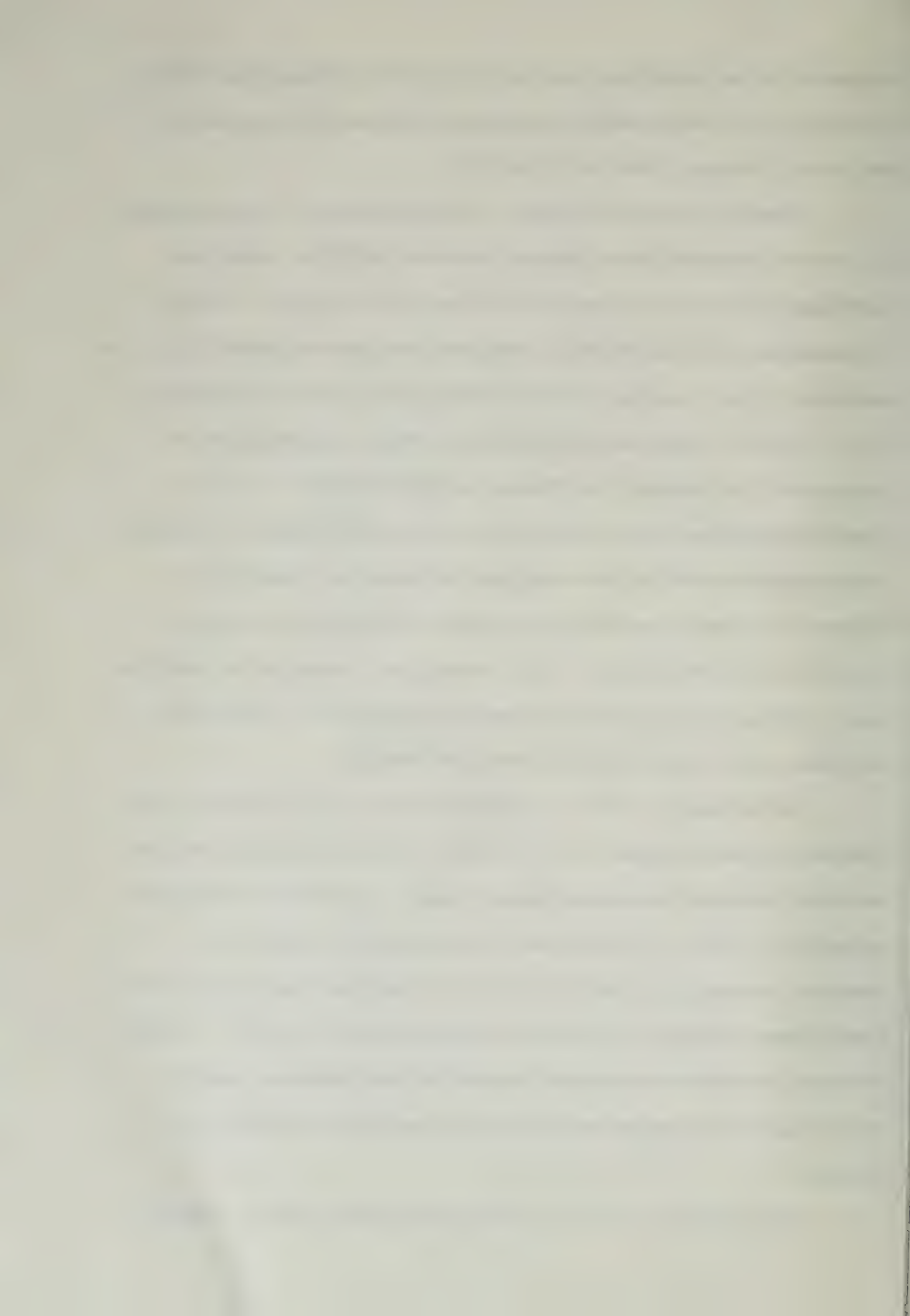
The essential facts surrounding the commission of this offense are not in dispute. On or before April 15, 1960, a 1959 United States individual income tax return was timely filed in the Los Angeles Internal Revenue District by appellant William L. Boyle on behalf of himself and his wife, Geraldine Boyle. On or before April 15, 1961, a similar return was filed by Mr. and Mrs. Boyle. On or about May 26, 1964, an amended return and claim for refund for the year 1959 was filed by the two parties and on or about May 28, 1964 they filed a similar amended return for the year 1960. The 1959 and 1960 individual returns were personally

prepared by the appellant, and he [R. T. 105, 106] supplied all the information for the amended returns and claims for refunds for the years 1959 and 1960 [R. T. 18, 19].

Sometime before October 9, 1961, John Gier, an investigator for the Orange County District Attorney's Office, began an investigation into the business activities of one Edwin I. Barkley in connection with his Barkley Pipeline Company and Mesa Pipe Line and Supply, Inc. account with the Midway City Sanitation District [C. T. 18, 19]. Appellant William Lyle Boyle was employed as manager of the Midway City Sanitation District [R. T. 79, 80]. This investigation had led officers to believe that Edwin L. Barkley had committed theft by overcharging for services rendered to Midway City Sanitation District through falsification of billing records and accounts [C. T. 19]. During the course of the investigation, Investigator Gier obtained search warrants for the Barkley and Mesa Pipe Line premises owned by Barkley.

On October 9, 1961 the first of these search warrants was executed by state agents [C. T. 14-16]. The return to this search warrant indicates that among other things, cancelled checks were seized [C. T. 16]. A second search warrant was issued and executed January 18, 1962 [C. T. 20, 21] and once again cancelled checks were seized from the Barkley premises [C. T. 25]. Each of these search warrants were issued for and executed against only property and premises owned and controlled by Edwin L. Barkley.

Apparently some of the cancelled checks seized pursuant



to the search warrant were used by the Government in appellant's trial (Exhibits 9, 10, 11 and 13). However the record does not reveal whether or not any of the Cashier's checks (Government's Exhibits 5-8, 12, 14, 15, 16) or the applications for these checks (Government's Exhibits 5-A - 8-A, 12-A, 14-A, 15-A) used by the Government in appellant's trial, were seized pursuant to those warrants or were the fruits of the warrants, or whether they were obtained through independent investigation.

In a state proceeding, *People v. Barkley and Boyle*, in which appellant was tried in a criminal action along with Edwin F. Barkley, evidence seized by Orange County District Attorney's investigators pursuant to the above search warrants was suppressed and charges dismissed [C. T. 31-32, 35].

The cancelled checks, the Cashier's Checks and applications, as well as the tax returns were the documentary evidence introduced by the Government at appellant's district court trial. The individual tax returns and amended returns showed that the gross income of appellant and his wife for the years 1959 and 1960 was \$10,154.60 and \$11,536.40 respectively [R. T. 7-10]. Evidence introduced by the Government in the form of the above mentioned checks proved that in 1959, appellant received \$9,975.47 from Edwin L. Barkley. In 1960, appellant received \$9,472.07 from Edwin C. Barkley. These sums are taxable income, a fact not contested in the instant appeal.

A total of eight Cashier's checks and applications were introduced into evidence through the testimony of the Operations

Officer for the Costa Mesa Bank of America [R. T. 24-25]. The checks were applied for and purchased by Edwin L. Barkley. The payee indicated in these checks was appellant. The date, amount and exact payee designation on each of these applications and on the checks are set forth below.

1. Dated 8/7/59 - \$1,500, Govt. Exhibits 5, 5-A;
Payee - Boyle Surveying [R. T. 24]
2. Dated 9/4/59 - \$997.00 - Govt. Exhibits 6, 6-A;
Payee - W. Lyle Boyle, Surveyor [R. T. 25]
3. Dated 10/2/59 - \$2,000 - Govt. Exhibits 7, 7-A;
Payee - W. Lyle Boyle [R. T. 25]
4. Dated 11/6/59 - \$1,982.47 - Govt. Exhibits 8, 8-A;
Payee-Boyle Surveying Service [R. T. 25, 26]
5. Dated 3/4/60 - \$1,206.00 - Govt. Exhibits 12, 12-A;
Payee - Boyle Survey [R. T. 26]
6. Dated 8/12/60 - \$211.00 - Govt. Exhibits 14, 14-A;
Payee - Boyle Survey Service [R. T. 26]
7. Dated 10/14/60 - \$1,000 - Govt. Exhibits 15, 15-A;
Payee - Boyle Survey Service [R. T. 26, 27]
8. Dated 11/10/60 - \$950 - Govt. Exhibits 16, 16-A;
Payee - Boyle Survey Service [R. T. 27].

The following cancelled checks drawn on the account of Barkley Pipeline Construction Incorporated, Edwin L. Barkley, were also introduced.

9. Dated 12/17/59, \$2,496.00 - Govt. Exhibit 9;
Payee W. Lyle Boyle, Licensed Land Surveyor
[R. T. 28]
10. Dated 1/12/60, \$2,187.62 - Govt. Exhibit 10;
Payee - W. Lyle Boyle, Licensed Land Surveyor
[R. T. 29]
11. Dated 1/16/60, \$2,383.00 - Govt. Exhibit 11;
Payee - W. Lyle Boyle, Licensed Land Surveyor
[R. T. 29]
12. No date, \$1,534.45 - Govt. Exhibit 13 [R. T. 46].

Evidence at trial showed that in addition to purchasing the Cashier's checks, Edwin L. Barkley personally prepared the commercial checks (Govt. Exhibits 9, 10, 11, 13) to Mr. Boyle, which was an exception to his routine business practice of having his bookkeeper prepare the checks for business expenses. Mr. Barkley instructed his bookkeeper to charge these checks to the bidding and estimating expense account of Barkley Pipeline Construction, Inc., although no bills for services rendered were received from appellant [R. T. 55-57]. Although these payments were for the ostensible purpose of survey work done by appellant, the appellant had ceased working as a surveyor in 1952 [R. T. 119].

Appellant received all of the above checks and personally cashed them [R. T. 39, 40, 46].

In October of 1961, two investigators for the Orange County District Attorney's Office interviewed appellant in the Board of

Director's Room at the Midway Sanitation District, his place of employment [R. T. 61, 62, 63]. At this time appellant stated he was quite sure he had declared payments from Mr. Barkley on his federal tax returns, but had probably forgotten them in his state returns [R. T. 64].

At trial appellant maintained that the payments from Barkley were loans and were not income of any type [R. T. 74-163].

V

ARGUMENT

A. THE DISTRICT COURT PROPERLY
ADMITTED DOCUMENTARY EVIDENCE
SEIZED BY STATE AUTHORITIES
PURSUANT TO SEARCH WARRANTS
WHERE APPELLANT HAD NO INTER-
EST EITHER IN THE PREMISES
SEARCHED OR THE PROPERTY
SEIZED.

1. Previous Suppression of Document-
ary Evidence By the California
State Court is Irrelevant, Since the
Federal Court Must Make an Inde-
pendent Inquiry Under Federal
Standards of Admissibility.
-

At the outset it must be noted that appellant does not here challenge sufficiency of the evidence to establish his guilt. Appellant argues that evidence was improperly admitted because of an unlawful search and seizure by state authorities and because state authorities did not warn appellant of his constitutional rights prior

to obtaining certain admissions subsequently used in the trial below.

Appellant evidently contends that Government Exhibits 5-16 were a product of the two search warrants executed by state officers (Appellant's Brief 5-6). However, the record indicates only that Govt. Exhibits 9, 10, 11 and 12 were seized pursuant to those warrants (at p. 6, supra).

Under the Elkins doctrine, previous suppression by a state court of evidence introduced in appellant's United States District Court trial would not affect its admissibility in the later federal case.

In Elkins v. United States, 364 U.S. 206, 4 L.Ed.2d 1669 (1960), the Supreme Court overruled the so-called "silver platter" doctrine, which had permitted the federal government "to avail itself of evidence improperly seized by state officers operating entirely on their own account". Byars v. United States, 273 U.S. 28 (1927). Under the Elkins rule:

" . . . evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial. In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or

not there has been such an inquiry by a state court,
and irrespective of how any such inquiry may have
turned out. The test is one of federal law, neither
enlarged by what one state court may have countenanced,
nor diminished by what another may have colorably
suppressed." 364 U.S. at pp. 223-224. (emphasis
added)

Thus it is irrelevant in federal court that the evidence in question was suppressed by the California state courts. Under the Elkins rule, it is the duty of the federal court to make an independent inquiry into the admissibility of the evidence, and "The test is one of federal law".

The Elkins rule has been consistently followed in the Ninth Circuit since its announcement.

Smith v. United States, 321 F.2d 427

(9th Cir. 1963);

Hill v. United States, 374 F.2d 871

(9th Cir. 1967).

2. Under Federal Law, Appellant Does Not Have the Requisite Standing to Object to Evidence Obtained Through Search and Seizure by State Authorities of Premises and Property Possessed, Owned, and Controlled by Another Person.

Rule 41(e) of the Federal Rules of Criminal Procedure

provides in pertinent part:

"A person aggrieved by an unlawful search and seizure may move . . . to suppress for use as evidence anything so obtained"

In the landmark case of Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed.2d 697 (1960), the Supreme Court said at page 261:

"In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given.' Hatch v. Reardon, 204 U.S. 152, 160. The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. . . ."

In the case at bar, the evidence was seized from premises in which appellant claims no interest whatsoever, possessory or otherwise. Nor does appellant claim an interest arising out of his presence on the searched premises at the time of the search. Finally, appellant does not claim and cannot claim that the search was "directed" at him - the record is clear that the search was part of an investigation of another person, Edwin Barkley, who was suspected of theft. Rather, appellant's claim is based in the first place upon an alleged ownership in the property seized.

The items complained of fall into three categories:

(1) applications for cashier's checks by one Edwin L. Barkley; (2) cashier's checks drawn on the Bank of America and payable to appellant or to "Boyle Surveying"; and (3) personal checks of Barkley Pipe Line Construction, Inc., drawn on the Bank of America and payable to appellant or "Boyle Surveying". As to the first category, the applications for cashier's checks, appellant makes no claim of standing, and clearly could not do so. The only persons who could possibly assert any interest in these documents are the bank.

Appellant does claim an interest sufficient to give standing as to the checks, based on the fact that he endorsed the checks in blank and transferred them, presumably for consideration, thereby warranting good title under section 3-417(2) of the Uniform Commercial Code, Cal. Comm. Code, Section 3417(2). This argument has no merit. The checks in question were presented to the payor bank, accepted, paid, cancelled, and returned to the

maker in the ordinary course of business. A transfer for value by a holder in due course transfers all of the transferor's right, title and the interest in the paper to the transferee. U.C.C. §§ 3-201, 3-301, 3-302, 3-305; Cal. Commercial Code §§ 3201, 3301, 3302, 3305.

Moreover, cancellation of the checks by the payor bank distinguishes the liability of all prior endorsers. U.C.C. §3-605(a); Cal. Commercial Code §3605(a). Thus, at the time of the seizure, the appellant had no right, title, or interest in these checks, nor, indeed, any liability on them.

Appellant makes the further argument that since evidence of unexplained funds in the hands of a taxpayer establishes a prima facie case of understatement of income, Davis v. United States, 226 F.2d 331 (6th Cir. 1955), cert. denied 350 U.S. 965, reh. denied 351 U.S. 915, he is in the position that his conviction would "flow from his possession". Therefore, appellant argues, he is entitled to object under this Court's decision in Diaz-Rosendo v. United States, 357 F.2d 125 (9th Cir. 1966). Appellant's reliance on Diaz-Rosendo is misplaced. In the first instance, the "possession" which is the subject of discussion in Diaz is actual or constructive possession of contraband articles. Thus the possessed article is the crime. In this case the possessed article, checks or proceeds, do not constitute the crime since the crux of the offense is a false statement knowingly made on an income tax return.

Nor can appellant logically contend that he had actual or

constructive possession of the seized checks. It is clear that his possession of the proceeds received when he cashed the checks did not confer direct or indirect control or power of disposition of the check document.

Additionally, the record does not reflect that the above stated prima facie instruction was proffered by either party or given to the jury [C. T. 63-163; R. T. 211-232]. Under these circumstances the jury would necessarily have based their decision on evidence other than the fact that appellant did not explain funds in his possession.

Furthermore, the Diaz-Rosendo doctrine requires that his conviction flow from possession at the time of the search, not simply possession. This is clearly shown by the holding in the Diaz-Rosendo case itself:

"Applying the teachings of Jones and Wong Sun neither appellant was on the 'premises' (the Buick automobile of Contreras) where the search occurred and their conviction did not flow from the possession by either one of them of the marijuana at the time of search. The appellants come squarely within the language of Jones which put them in the category of those 'who claim prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.' Likewise these appellants are in the position of Wong Sun since 'no right of privacy of person or

premises' of theirs was invaded 'which would entitle (them) * * * to object' to the use of the marijuana and the piece of paper as evidence in their trial."

Diaz-Rosendo v. United States, supra, p. 32

(emphasis added).

This Court has recently re-affirmed its position that the conviction-flowing-from-possession doctrine applies only to one who has possession at the time of search. Hill v. United States, 374 F.2d 871 (9th Cir. 1967).

In Hill the appellant caused records of a corporation of which he was President and owner to be turned over to a partnership in which he had no interest. These files were later obtained by state authorities, and the Ninth Circuit Court of Appeals assumed that the records were obtained in violation of the Fourth Amendment to the Constitution. After the files were used in a local prosecution against the appellant they were turned over to federal authorities and admitted in his federal prosecution. The Court held that the partnership was the "victim of the seizure (the one against whom the search was directed)" while appellant was "one who claims prejudice only through the use of evidence gathered as a consequence of a search directed at someone else". Hill, supra, at p. 873. Thus mere possession of evidence at some time prior to arrest or seizure did not confer standing on the appellant in Hill, nor does it confer standing on the appellant in this case.

The Court's approach in these cases is clearly a correct

application of the exclusionary provisions of Rule 41(e), in light of the policy underlying that rule as explained in Jones v. United States, supra. That is, the rule is designed only to protect the right of privacy guaranteed by the Fourth Amendment. One whose privacy has in no way been invaded cannot invoke the protection. The present appellant is such a person, and it is submitted that under the Diaz-Rosendo and Hill cases, appellant had no standing to object to the use of this evidence.

3. Under Federal Law, the Search
and Seizure Were Lawful.

a. The Affidavit in Support of the
Applications For Search War-
rants Set Forth Sufficient
Probable Cause.

It is well-settled law that an affidavit setting forth mere information and belief is insufficient to sustain a search warrant.

Jones v. United States, supra;

Nathanson v. United States, 290 U.S. 41 (1933).

The affidavit must either be based upon the personal knowledge of the affiant, in which case some of the underlying facts must be stated, or if it be based upon information gained from informants, underlying circumstances must be shown to support the credibility and reliability of the informants.

Jones v. United States, supra;

United States v. Ventresca, 380 U.S. 102 (1965);

Travis v. United States, 362 F.2d 477

(9th Cir. 1966).

As the Court said in Ventresca:

"Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. . . . Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." 380 U.S. at p. 109. (emphasis added)

In the instant case, the affidavit in support of the first search warrant set forth detailed facts and circumstances with regard both to the affiant's personal knowledge and to the information supplied by the informants. In support of his belief, the affiant recited:

" . . . personal observation of the Barkley Pipe Line Company bank account in the Costa Mesa branch of the Bank of America and a carbon copy of a cashier's check from Edwin L. Barkley payable to the order of W. Lyle Boyle, superintendent of the Midway City Sanitary District."



In addition to this personal knowledge, the affiant's informant,

" . . . actually observed the billing made to the Midway City Sanitary District for July, 1961, approximately \$1300.00, and knew that it was incorrect as he had serviced the machinery listed in the billing, and he knew this machinery to be on location for the Midway City Sanitary District for only eleven hours during July, 1961, and the bill should have been not over \$200.00. . . ."

This latter statement alone contains within it all of the elements which the Supreme Court has said to be necessary. The facts themselves are clearly set forth; and the informant is sufficiently identified as a machinery service mechanic for the magistrate (in this case, a Municipal Court judge) to be able to evaluate his peculiarly knowledgeable position vis-a-vis the facts alleged. Moreover, the type of information and the very nature of the facts themselves lends them credibility; here we have not a revelation of secret transactions in the underworld by an informant who himself participated in the criminal transaction, but rather the informant appears to be a law-abiding citizen exercising his duty to come forward with facts indicating a criminal venture in which he took no part. The recital of circumstances easily verifiable - the amount of the bill to the Sanitary District is ascertainable from an examination of the records of that public agency,

and the location of machinery could hardly go unnoticed. Thus the situation here is not unlike that presented in Smith v. United States, 321 F.2d 427 (9th Cir. 1963), in which this Court found probable cause in a bare recital of certain facts ascertainable from public records, without any statement by the affiant as to how he had actually learned said facts.

Under Ventresca, warrants are given a preference; doubtful cases are to be decided in favor of admission of evidence seized pursuant to a search warrant signed by a detached judicial officer. Moreover, the affidavits are to be read in a commonsense way, not overly technical. It is therefore submitted that in view of Ventresca and Smith, the affidavit here in question satisfied the federal requirements of probable cause.

b. The Items to be Seized Were
 Described With Sufficient
 Particularity.

Appellant contends that the description of property to be seized under the search warrant was not sufficiently particular, in that it listed, inter alia, cancelled checks and books and records of the business. In support of this contention, appellant relies primarily on Aday v. Superior Court, 55 Cal. 2d 789 (1961), and Stanford v. Texas, 379 U.S. 476 (1965).

It is significant, however, that the cases relied upon by appellant all involved criminal prosecutions in which the court viewed the search and seizure, and the prosecution itself, as

impinging on the right of free speech guaranteed by the First Amendment. Indeed the nature of the crime charged has little connection to financial records whereas the instant case as well as the theft investigation was founded on financial transactions and records. Under such circumstances, all the financial records of the business are clearly relevant and material to the offense. Thus the situation here is not unlike that in Marron v. United States, 275 U.S. 192 (1927), in which the seizure of ledgers and other records including even utilities bills, was held lawful, where the seizure was incident to an arrest for operating an illegal still.

The search and seizure in this case did not constitute a mere fishing expedition, as appellant would have it, but was clearly directed to materials pertinent to the offense, and described as particularly as is possible. The Supreme Court itself recognized this distinction in Stanford v. Texas, where it pointed out that:

"The word 'books' in the context of a phrase like 'books and records' has, of course, a quite different meaning. A 'book' which is no more than a ledger of an unlawful enterprise thus might stand on a quite different constitutional footing from the books involved in the present case." 379 U. S. at page 485 (fn. 16)

B. STATEMENTS OF APPELLANT MADE
TO STATE AGENTS INVESTIGATING
ANOTHER PERSON FOR A STATE
OFFENSE UNRELATED TO A FEDERAL
CRIME WERE PROPERLY ADMITTED
INTO EVIDENCE.

Appellant contends that his statements elicited in an interview with investigators from the Orange County District Attorney's Office were inadmissible under the doctrine of Escobedo v. State of Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964). In this statement appellant said that he was certain that he had declared payments from Barkley on his federal tax return but that he probably forgot to include them in his state return [R. T. 64].

The interview in this case would hardly seem to fall within the factors requiring exclusion in Escobedo. Initially it must be noted that the investigation was wholly unrelated to the charges culminating in appellant's federal prosecution. The crime under investigation was the state offense of grand theft. Any admission of appellant with regard to the federal crime of tax evasion was purely ancillary to the inquiry concerning the theft charge. No investigation could have begun to "focus" on the appellant as a particular suspect, much less be in the accusatory stage", since no investigation was being conducted concerning his tax returns. Nor can it be said that the agents were carrying out a process of interrogation that lent itself to eliciting incriminating statements.

In a similar case, Miller v. United States, 354 F.2d 801 (8th Cir. 1966), state agents interviewed the appellant concerning

abortion charges and in the process obtained admissions later used in a federal tax evasion prosecution. The court distinguished Escobedo, since, as in the instant case, something less than a confession was involved. An even more significant distinction was found in the fact that the income tax case against appellant had not entered the accusatory stage at the time she was questioned by state officers. The court stated:

"We are unwilling, in the absence of cogent reasons to the contrary, to say that when the accused is the focus of one crime (here abortion), admissions as to another completely unrelated crime (here tax evasion) the commission of which is unknown to the investigating officers, will be inadmissible into evidence as falling within the blanket exclusionary rule of Escobedo. The Escobedo defendant had clearly become the accused in the murder charge for which he was eventually tried, and his admissions related to the murder charge. This is not the situation herein." 354 F.2d 806.

The record does not indicate even that appellant was under investigation on the state theft charges. The search warrant affidavit of investigator Geir shows only that the checks from Barkley to Boyle were evidence of Barkley's overbilling (Appellant's Brief, p. 27; C. T. 18-19). There is nothing to indicate that the interview was other than an attempt to garner more evidence

against Barkley concerning the alleged theft activities. Similarly there is nothing to indicate that appellant was a suspect at all prior to the interview.

Appellant's contention that he had been "taken into police custody" under Escobedo is without foundation. Appellant was manager of the Midway City Sanitary District [R. T. 79, 80]. In light of this fact it can hardly be said that the Board of Director's Office of that agency "is as foreboding and confining as any office in a police station" (Appellant's Brief, p. 28). Nor is there anything in the record to indicate other than that appellant willingly invited officers into the comfortable surroundings of the Board of Director's Office. On the contrary, it would seem more likely that appellant felt that he could ask the investigators to leave the premises of his employer at any time.

Even assuming for purposes of argument the instant case was factually within the holding of Escobedo, it has repeatedly been held in the Ninth Circuit and other federal circuits that Escobedo has no application to Federal Tax Fraud Investigations where the accused has neither been indicted nor arrested at the time of the interview.

Kohatsu v. United States, 351 F.2d 898,
cert. denied 384 U.S. 1011 (9th Cir. 1965);
United States v. Fiore, 258 F. Supp. 435
(D.C. W. Penn., 1966);
Mathes v. United States, 376 F.2d 595
(5th Cir. 1967);

United States v. Mancuso, 378 F.2d 612

(4th Cir. 1967);

Selinger v. Bigler, 377 F.2d 543 (9th Cir. 1967);

Rickey v. United States, 360 F.2d 32

(9th Cir. 1966).

CONCLUSION

Appellant does not challenge the sufficiency of the evidence of guilt but contends that certain evidence used to prove guilt beyond a reasonable doubt should have been excluded by the trial court. However, appellant has no standing to challenge admission of documentary evidence obtained from the premises of Edwin Barkley by state agents pursuant to search warrants. Appellant had no interest in the premises searched; was not present on Barkley's premises at the time of the search; and the search was not directed at him. Nor did appellant have an interest sufficient to confer standing to challenge the admission of the negotiated and cancelled checks which were seized from Barkley's business files during the search.

Under federal standards of admissibility, the search pursuant to warrants issued by a detached judicial officer was lawful in all respects. Keeping in mind that marginal cases must be determined by the preference to be accorded to warrants, the affidavit stated sufficient probable cause both with regard to the affiant's personal knowledge and to the information supplied by

informants. The items to be seized were described with sufficient particularity in view of the fact that all the financial records of the business are clearly relevant and material to the offense under investigation at the time of the search.

Statements of appellant made to state agents were properly admitted over objection on Escobedo grounds. The record does not reveal whether or not appellant himself was being investigated for any crime, or if he was, it was for a state crime unrelated to the federal charges involved in this case. Under these circumstances it can hardly be said that an investigation had "focused" on appellant or that state agents had initiated a process tending to elicit incriminating statements. Moreover, since the interview was held in the office of appellant's employer, the contention that appellant had been taken into police custody is without foundation.

Since the record reflects that all evidence was properly admitted by the trial court, it is respectfully requested that the judgment below be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

MICHAEL D. NASATIR,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael D. Nasatir
MICHAEL D. NASATIR

No. 21689

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HARRAH'S CLUB, RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,

General Counsel,

DOMINICK L. MANOLI,

Associate General Counsel,

MARCEL MALLET-PREVOST,

Assistant General Counsel,

SOLOMON I. HIRSH,

ROBERT M. LIEBER,

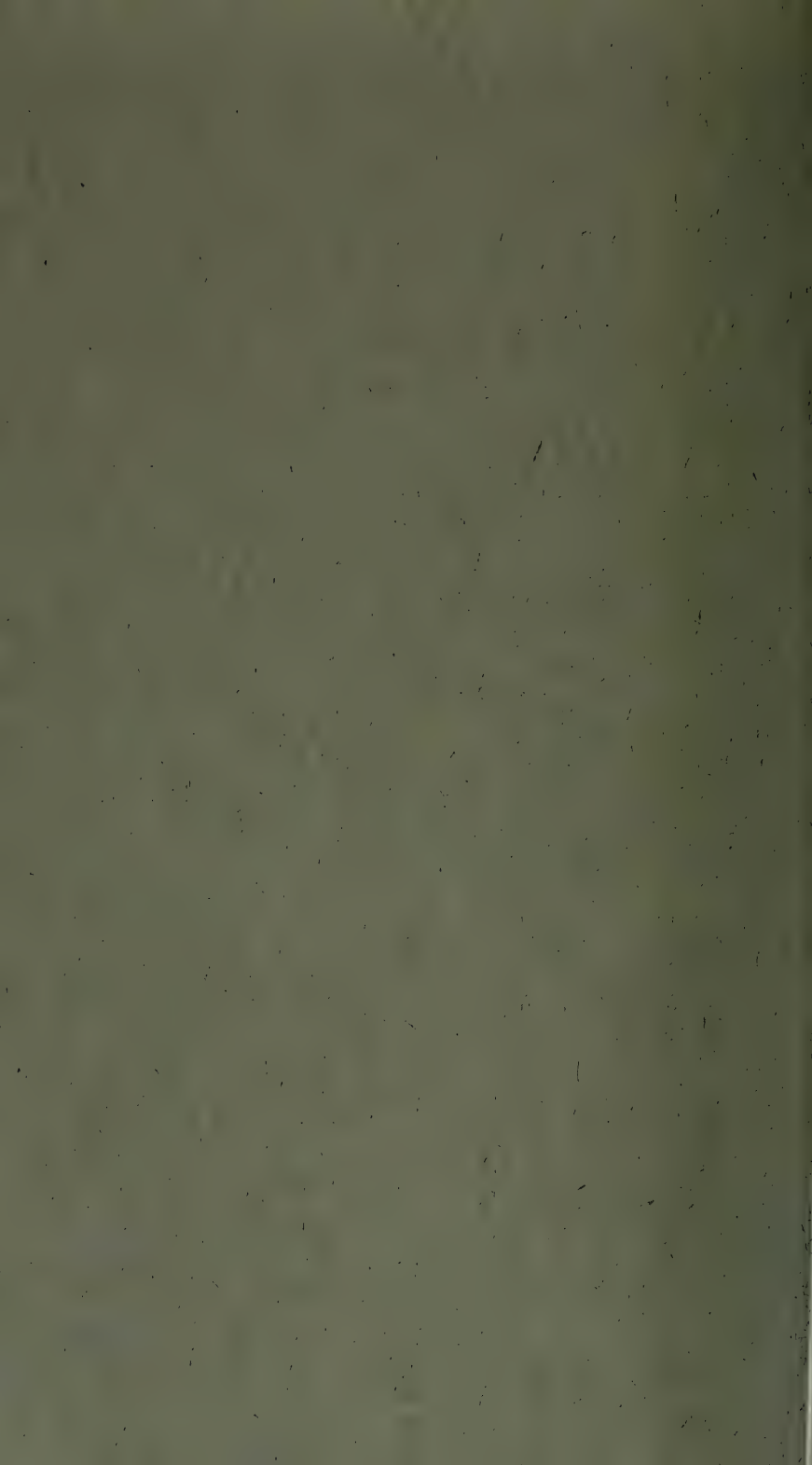
Attorneys,

National Labor Relations Board.

FILED

SEP 8 1967

SEP 11 1967
WM. B. LUCK, CLERK



INDEX

	Page
Jurisdiction -----	1
Statement of the case -----	2
I. The Board's findings of fact -----	2
A. The business of respondent -----	2
B. The representation proceedings -----	3
C. Respondent's unfair labor practices -----	4
1. Background: Respondent threatens retaliation against employees because of the advent of the Union -----	4
2. The withdrawal of tokens -----	9
3. Cole and Lovelady are laid off -----	10
a. The layoff of Allan Cole -----	11
b. The layoff of Bruce Lovelady -----	12
4. Respondent's refusal to bargain -----	14
II. The Board's conclusion and order -----	14
Argument -----	16
I. The Board properly asserted jurisdiction over respondent -----	16
II. Substantial evidence on the record as a whole supports the Board's finding that respondent violated Section 8 (a) (1), (3) and (5) of the Act by unilaterally prohibiting unit employees from receiving tokens -----	18
III. Substantial evidence on the record as a whole supports the Board's finding that respondent violated Section 8 (a) (3) and (1) of the Act by laying off Cole and Lovelady because of their union activities -----	25
IV. The Board properly ordered respondent to offer reinstatement and backpay to Lovelady and Cole -----	34

Argument—Continued

V. Substantial evidence on the record as a whole supports the Board's finding that respondent violated Section 8 (a) (5) and (1) of the Act by refusing to bargain with the employees' exclusive bargaining representative.....	Page 36
Conclusion	45
Certificate	45
Appendix A.....	47
Appendix B.....	51

AUTHORITIES CITED

Cases:

<i>Acer Realty Co. v. Comm. of Internal Revenue</i> , 132 F. 2d 512 (C.A. 8).....	18
<i>Bon Hennings Logging Co. v. N.L.R.B.</i> , 308 F. 2d 548 (C.A. 9).....	36
<i>Brown v. Stapleton</i> , 216 Ind. 387, 24 N.E. 2d 909.....	17
<i>Clark v. Brown</i> , 234 S.W. 2d 1013.....	17-18
<i>Commissioner v. Sunnen</i> , 333 U.S. 591.....	19
<i>E</i> _____ <i>v. G</i> _____, 317 S.W. 2d 462.....	18
<i>General Shoe Corp.</i> , 77 NLRB 124.....	39
<i>Gorrien v. Jamison</i> , 200 Pac. 2d 488.....	18
<i>Hake v. Youngs, et ux.</i> , 254 Mich. 545, 236 N.W. 858.....	17
<i>Harrah's Club</i> , 150 NLRB 1702, enf'd, 362 F. 2d 425 (C.A. 9), cert. den., 386 U.S. 915.....	4, 5, 6, 7, 26, 29
<i>Mundet Cork Corp.</i> , 96 NLRB 1142.....	36
<i>N.L.R.B. v. Air Control Prods.</i> , 335 F. 2d 245 (C.A. 5).....	37
<i>N.L.R.B. v. Atkinson Dredging Co.</i> , 329 F. 2d 158 (C.A. 4), cert. den., 377 U.S. 965.....	39-40, 41
<i>N.L.R.B. v. Bata Shoe Co.</i> , 377 F. 2d 821 (C.A. 4).....	37
<i>N.L.R.B. v. Biscayne Television Corp.</i> , 337 F. 2d 267 (C.A. 5).....	34
<i>N.L.R.B. v. Carlisle Lumber Co.</i> , 94 F. 2d 138 (C.A. 9), cert. den., 304 U.S. 575.....	16
<i>N.L.R.B. v. Carlton Wood Prods. Co.</i> , 201 F. 2d 863 (C.A. 9).....	37
<i>N.L.R.B. v. Central Ill. Pub. Service Co.</i> , 324 F. 2d 916 (C.A. 7).....	24
<i>N.L.R.B. v. Citizens Hotel</i> , 326 F. 2d 501 (C.A. 5).....	24, 25
<i>N.L.R.B. v. City Yellow Cab Co.</i> , 344 F. 2d 575 (C.A. 6).....	28

III

Cases—Continued

	Page
<i>N.L.R.B. v. Clearfield Cheese Co.</i> , 322 F. 2d 89 (C.A. 3) -----	37
<i>N.L.R.B. v. J. J. Collins' Sons</i> , 332 F. 2d 523 (C.A. 7) --	37
<i>N.L.R.B. v. Gene Compton's Corp.</i> , 262 F. 2d 653 (C.A. 9) -----	17
<i>N.L.R.B. v. Elec. Steam Radiator Corp.</i> , 321 F. 2d 733 (C.A. 6) -----	25
<i>N.L.R.B. v. Exchange Parts Co.</i> , 339 F. 2d 829 (C.A. 5) -----	25
<i>N.L.R.B. v. Griggs Equip., Inc.</i> , 307 F. 2d 275 (C.A. 5) -----	28
<i>N.L.R.B. v. Harrah's Club</i> , 362 F. 2d 425 (C.A. 9), cert. den., 386 U.S. 915 -----	16, 17, 19
<i>N.L.R.B. v. Idaho Potato Processors, Inc.</i> , 322 F. 2d 573 (C.A. 9) -----	33
<i>N.L.R.B. v. Joelin Mfg. Co.</i> , 314 F. 2d 627 (C.A. 2) ---	37-38
<i>N.L.R.B. v. Kanmak Mills, Inc.</i> , 200 F. 2d 542 (C.A. 3) -	35-36
<i>N.L.R.B. v. Lindsay Newspapers, Inc.</i> , 315 F. 2d 709 (C.A. 5) -----	28
<i>N.L.R.B. v. Merchants Police, Inc.</i> , 313 F. 2d 310 (C.A. 7) -----	28
<i>N.L.R.B. v. Moss Amber Mfg. Co.</i> , 264 F. 2d 107 (C.A. 9) -----	16-17
<i>N.L.R.B. v. Mrak Coal Co.</i> , 322 F. 2d 311 (C.A. 9) ----	34
<i>N.L.R.B. v. My Store, Inc.</i> , 345 F. 2d 494 (C.A. 7), cert. den., 382 U.S. 927 -----	24
<i>N.L.R.B. v. Nat'l Survey Service, Inc.</i> , 361 F. 2d 199 (C.A. 7) -----	37
<i>N.L.R.B. v. O. K. Van Storage, Inc.</i> , 297 F. 2d 74 (C.A. 5) -----	37, 38, 40, 41
<i>N.L.R.B. v. Parkhurst Mfg. Co.</i> , 317 F. 2d 513 (C.A. 8) -----	18
<i>N.L.R.B. v. Quest-Shon Mark Brassiere Co.</i> , 185 F. 2d 285 (C.A. 2), cert. den., 342 U.S. 812 -----	35
<i>N.L.R.B. v. Security Plating Co.</i> , 356 F. 2d 725 (C.A. 9) -----	34
<i>N.L.R.B. v. J. R. Simplot Co.</i> , 322 F. 2d 170 (C.A. 9) --	18, 37
<i>N.L.R.B. v. Southern Bleachery & Print Works, Inc.</i> , 257 F. 2d 235 (C.A. 4), cert. den., 359 U.S. 911 -----	16, 17
<i>N.L.R.B. v. Texas Indep. Oil Co., Inc.</i> , 232 F. 2d 447 (C.A. 9) -----	34

Cases—Continued

<i>N.L.R.B. v. Tex-O-Kan Flour Mills Co.</i> , 122 F. 2d 433 (C.A. 5)-----	Page 17
<i>N.L.R.B. v. Toffenetti Restaurant Co., Inc.</i> , 311 F. 2d 219 (C.A. 2), cert. den., 372 U.S. 977-----	24, 25
<i>N.L.R.B. v. U.S. Air Conditioning Corp.</i> , 336 F. 2d 275 (C.A. 6)-----	24
<i>N.L.R.B. v. Victory Plating Works, Inc.</i> , 325 F. 2d 92 (C.A. 9)-----	33
<i>N.L.R.B. v. Wells, Inc.</i> , 162 F. 2d 457 (C.A. 9)-----	34
<i>N.L.R.B. v. Wonder State Mfg. Co.</i> , 344 F. 2d 210 (C.A. 8)-----	24
<i>N.L.R.B. v. Zelrich Co.</i> , 344 F. 2d 1011 (C.A. 5)-----	24, 25
<i>Fred E. Nelson, etc.</i> , 102 NLRB 780, enf'd, 208 F. 2d 230 (C.A. 3)-----	36
<i>Oates Bros., Inc.</i> , 127 NLRB 1674-----	41
<i>Pearce v. Coogle, et al.</i> , 297 Ky. 194, 178 S.W. 2d 938---	17
<i>Phelps-Dodge Corp. v. N.L.R.B.</i> , 313 U.S. 177-----	36
<i>Precision Fabricators v. N.L.R.B.</i> , 204 F. 2d 567 (C.A. 2)-----	28
<i>Schiano v. McCarthy Freight System, Inc.</i> , 65 A. 2d 462-----	18
<i>Shattuck Denn Mining Corp. v. N.L.R.B.</i> , 362 F. 2d 466 (C.A. 9)-----	33
<i>Sheltra v. O'Rourke</i> , 51 R.I. 392, 155 Atl. 401-----	18
<i>Standard Generator Service Co. v. N.L.R.B.</i> , 186 F. 2d 606 (C.A. 8)-----	24, 25
<i>Thermoid Co.</i> , 90 NLRB 614-----	36
<i>Thompson v. Shutz</i> , 309 Ky. 253, 217 S.W. 2d 315-----	17
<i>Walsh v. Butte, A & P Ry. Co.</i> , 109 Mont. 456, 97 P. 2d 325-----	18
<i>Yeoman v. Kansas City</i> , 18 S.W. 2d 107-----	17

Statutes:

Administrative Procedure Act, recodified (5 U.S.C. § 556(e))-----	19
Section 7(d)-----	19, 20
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.)-----	1
Section 2(11)-----	27
Section 8(a) (1)-----	2, 4, 18, 25, 36
Section 8(a) (3)-----	2, 4, 18, 25

Statutes—Continued

Page

National Labor Relations Act, etc.—Continued

Section 8(a) (5) -----	2, 18, 36
Section 9(c) (1) -----	37
Section 9(c) (4) -----	37
Section 10(e) -----	1

Miscellaneous:

<i>Attorney General's Manual on the Administrative Procedure Act</i> , pp. 79-80 (G.P.O., 1947) -----	20
<i>Developments in the Law-Res Judicata</i> , 65 Harv. L. Rev. 818, 840 (1952) -----	19
N.L.R.B. Rules, Section 102.69(b), 29 C.F.R. § 102.69 (b) -----	37

**In the United States Court of Appeals
for the Ninth Circuit**

No. 21689

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HARRAH'S CLUB, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),¹ to enforce its order issued against respondent, Harrah's Club, on May 10, 1966. The Board's decision and order (R. 84-86)² are reported

¹ The pertinent statutory provisions are reprinted *infra*, pp. 47-50.

² References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. References designated "GCX" or "RX" are to exhibits of the General Counsel or respondent, respectively.

at 158 NLRB No. 76. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Stateline, Nevada, where respondent operates gambling casinos and restaurants.

STATEMENT OF THE CASE

I. The Board's findings of fact

The Board found that respondent is engaged in commerce within the meaning of the Act; that it violated Section 8(a) (3) and (1) by discharging employees Bruce Lovelady and Allan Cole because of their union activities; that it violated Section 8(a) (1), (3) and (5) of the Act by unilaterally prohibiting unit employees from receiving gratuities from performers; and that it violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union³ after its certification by the Board. The facts upon which the Board's findings are based are summarized below.

A. The business of respondent

Respondent, a Nevada corporation with its main offices in Reno, owns and operates restaurants and gambling casinos in Reno and Stateline, Nevada. During its past fiscal year, respondent had purchased and received materials valued in excess of \$50,000 directly from outside Nevada; and during the same period respondent sold goods and services at retail in excess of \$500,000 valuation (R. 46; GCX(1)g, paragraph

³ International Alliance of Theatrical Stage Employees & Motion Picture Operators of the United States and Canada Local 363, AFL-CIO.

I, GCX 1(i)). The largest operation in the Harrah's complex is Harrah's Tahoe, located at Lake Tahoe in Stateline, Nevada. It contains the South Shore Room, a theatre-restaurant which accommodates 700 guests and features many of the outstanding performers in the entertainment field. This proceeding concerns the stage technicians who build and maintain the scenery, shift it as the requirements of a show demand, operate and maintain the lighting, sound and other stage equipment, and generally provide the technical services for stage productions in the South Shore Room.

B. The representation proceedings

On August 14, 1963, the Union filed a petition (designated Case No. 20-RC-5597 by the Board) for a representation election among the stage technicians. The respondent and the Union entered into a Stipulation for Certification upon Consent Election, wherein the appropriate unit was defined as "All stage technicians, apprentice stage technicians and sound console operator in the South Shore Room employed by Harrah's Club at Lake Tahoe; excluding all other employees, guards and supervisors as defined in the Act" (GCX 2(b)). Pursuant to the stipulation an election was conducted on October 14, 1963, with 11 stage technicians voting in favor of the Union and a ballot challenged. On October 18, respondent filed timely objections to alleged conduct affecting the results of the election. Following an investigation of the misconduct alleged in the objections, the Regional Director, on November 15, 1963, issued his report recommending dismissal of the objections. Respondent

excepted to the recommendation, and on February 27, 1964, the Board issued its Decision and Certification of Representatives adopting the findings and recommendations of the Regional Director, dismissing the objections, and certifying the Union as the exclusive bargaining representative of the unit employees.

C. Respondent's unfair labor practices

1. *Background: Respondent threatens retaliation against the employees because of the advent of the Union*

On September 5, 1963, a conference was held at the Board's Regional Office in San Francisco regarding the Stipulation for Certification upon Consent Election in Case No. 20-RC-5597. Bruce Lovelady, a stage technician in the South Shore Room, attended that conference because he had not made up his mind about the Union and "wanted to find out what was going on" (R. 49; 150 NLRB at 1706, Tr. 56).⁴ Harrah's Club was represented by its vice president,

⁴ On September 5, 1963, the Union filed an unfair labor practice charge against respondent, designated Case No. 20-CA-2839 by the Board. A hearing held on the charge resulted in the issuance of the Board's Decision and Order, *Harrah's Club*, 150 NLRB 1702 (enforced, 362 F. 2d 425 (C.A. 9), cert. denied, 386 U.S. 915), finding, *inter alia*, that respondent had violated Section 8(a) (3) and (1) of the Act by discharging employee Robert H. Wetherill, and further violated Section 8(a)(1) of the Act by threatening and coercively interrogating employees. In the instant case the Trial Examiner, at the request of counsel for the General Counsel, took judicial notice of the proceedings in Case No. 20-CA-2839 and the facts found therein. When mention is made of such facts herein, we shall refer the Court to the Board's decision in case No. 20-CA-2839, as well as the decision in the instant case.

Rome Andreotti, Director of Industrial Relations Robert Brigham, Producer Arthur Barkow, and attorney Nathan R. Berke (150 NLRB at 1706).

When Lovelady returned to work on the evening of the following day, his supervisor, Stage Manager Sy Lein, remarked, "Well, I guess you know management has written you off their list" (R. 49; Tr. 57, 150 NLRB at 1706). Asked for an explanation, Lein replied, "Well, because you went to the hearing in San Francisco and they have said, well, you are on the Union's side" (*ibid.*). Lovelady pointed out that it was an open hearing and that he had merely gone to see "what was happening" (*ibid.*). Lein said, "I told them that, but they have written you off as being on the Union's side" (*ibid.*).

On September 9, Lein told Lovelady that if the stage technicians "brought the union in at this time," they would have less job security, and "would probably not all be kept on" (R. 49; 150 NLRB at 1706). On the same morning, Donald Rux, another stage technician, was told by Producer Barkow, "Of course, you know the [stage] crew will be cut back because of the union activity" (*ibid.*).

The certification election was held on October 14, 1963. Shortly before the balloting began the Union announced that stage technician Allan Cole would be its "observer" at the election (Tr. 57-58). When Lein heard the announcement he turned to Lovelady and said, "* * * Allan Cole is an observer for the Union. Didn't I tell you he was one of the ring-leaders?" (Tr. 58).

On the day following the election several stage technicians were seated at a table in the employees' cafeteria (R. 49; 150 NLRB at 1709). Robert Brigham, respondent's director of industrial relations, approached the group and said, "I have just been made a fool of and I don't like it * * * It may take me six to eight months to get even, but I will" (*ibid.*). Later, as he was leaving the cafeteria, Brigham pointed to another group of stage technicians, stating, "I will get them too" (R. 50; 150 NLRB at 1709).

Shortly thereafter Brigham was told by Vice-President Andreotti that an employee had complained that he (Brigham) had threatened the stage technicians. The following evening Brigham explained to employees Ponts and McNerthney that his remarks had been misunderstood (R. 50; 150 NLRB at 1710). He remarked, "What I said [which] may have been construed as a threat was that the crew would be reduced in the next couple of months and that the next eight to ten months would prove to be highly educational" (R. 50; 150 NLRB at 1711). Brigham added that "he really didn't know how he personally could get even with anybody, but the whole thing would be proven out in the next months to follow, as the crew was cut back from 30 to 40 percent" (R. 50; 150 NLRB at 1711).

The next evening in the cafeteria Brigham found a group of stage technicians at a table (R. 50; 150 NLRB at 1711). Brigham said that he wanted to apologize if he had cursed or threatened them (*ibid.*). One of the employees interrupted, saying,

"You didn't curse us. You threatened us" (*ibid.*). Brigham replied, "If I did not then, I do it [now]. I am a vindictive man, and, believe me, what I said still goes. Within six to eight months this crew will be reduced 30 to 50 percent" (*ibid.*).

On October 16 or 17, 1963, Entertainment Director Robert Vincent inquired of Lovelady, "Are you aware that we would have done anything to have stopped this Union thing" (R. 50; 150 NLRB at 1711-1712). He added that management would have discharged Barkow, Lein, or Jacques Vogt (the chief lighting technician) "like that," snapping his fingers, if necessary to combat the Union (R. 50; 150 NLRB at 1712). Vincent also said that "Mr. Harrah was basically against all unions, that he didn't want any part of this or any other union, that he worked long and hard for his business and had gotten it where it was today and he felt that he had the right to run it and control it the way he wanted it without outside interference" (*ibid.*). Later that day Vincent told stage technician Charles Walker that he (Walker) had been "very foolish" in voting for the Union and that his chances for a position with management were "washed up" (R. 50; 150 NLRB at 1712).

Late in October, Lein remarked to Lovelady, "If we have a show that only needs two * * * or three men, it won't be like in the past where you all stayed on working. That is all we will use and the rest of you will be out of work" (R. 50; 150 NLRB at 1714).

On January 11, 1964, respondent's vice president for public relations, Patrick France, was having lunch

with technician Rux (Tr. 293). During the course of their conversation, France said to Rux:

This guy Lovelace [sic] * * * he has you bamboozled. He has you saying he is the best man for the job of stage manager * * * [⁵] Well, time is running out. If you and Dick Ponts [another stage technician] will try to get a new vote for the Union contract, I will take it from there. You and Dick will be the top on the list for the stage manager's job and more money * * *. Do you think in the past before this Union came up you would have gotten two weeks off for watching television? [⁶] * * * If the Union comes in, you are going to be watched very closely, and one more mistake and you are through * * *. You are going to be married pretty soon, aren't you * * * [t]o one of the girls in the show * * *. Do you know what will happen if I went to George Morrow [⁷] and told him to get rid of her * * *. Do you think I would hesitate to tell him to get rid of her? [R. 58; Tr. 294-295].

Rux replied, "No, I don't think you would" (Tr. 295). France added, "Think about it. You get together with Dick Ponts and talk about it, and I will take the ball from there," and gave Rux his unlisted home telephone number (R. 58; Tr. 295).

⁵ In November 1963, Sy Lein, the stage manager, was terminated by respondent (R. 57-58; Tr. 1043). Producer Barkow assumed responsibility for Lein's job in addition to his own until a replacement for Lein was found (R. 57; Tr. 1043).

⁶ Some time earlier Rux and two other employees had been suspended for two weeks without pay for watching television during a performance by Jack Benny (R. 58).

⁷ George Morrow is half owner of Moro-Landis Productions which produces the so-called "production numbers"—the dancing part of South Shore Room shows (Tr. 295-296).

2. *The withdrawal of tokens*^a

Prior to the advent of the Union, the stage technicians at Harrah's were accustomed to receiving tokens from performers in addition to their regular salary. This was the usual practice at Harrah's, as it is elsewhere in the industry (R. 57; Tr. 77, 141-142, 160-162). Generally, the tokens were handed in envelopes to each of the stage technicians on the closing night of a show by one of the company's supervisors, such as Producer Barkow or Stage Manager Lein (Tr. 164-165, 932-935). The stage technicians each received \$300 or more annually in tokens, thus making their receipt a substantial term of employment (R. 57; Tr. 78, 142-144, 162, 1436-1438, GCX 12).

On December 23, 1963, about five weeks after the issuance of the Regional Director's report recommending that respondent's objections to the election be dismissed, respondent posted a notice that tokens could no longer be accepted by the stage crew (R. 46, 57; Tr. 78). Subsequently, early in 1964, the following paragraph was added to respondent's employee handbook, "You and Your Job" (RX 33, pp. 24-25):

When a service is performed not for a customer but for someone doing contractual work for Harrah's and when Harrah's pays the employee specifically for performing such serv-

^a A "toke" is an item of value, usually money, given by an entertainer to supporting individuals—stagehands, wardrobe mistresses or others performing "service" roles (R. 57; Tr. 77).

ice, no toke may be accepted by the employee performing such service.⁹

Following the posting of the notice, Trudy Grei-meister, the wardrobe mistress, not in the bargaining unit, went to Robert Vincent and inquired if the notice regarding tokes included her. He told her that it did not, and she has received tokes since that date (R. 52; Tr. 80-81, 187, 936).

3. Cole and Lovelady are laid off

Prior to the stage technicians' selection of the Union as their bargaining representative on October 14, 1963, it was respondent's practice to keep them on the payroll all the time, even when the amount of work needed for a particular show required less than a full crew or even when no show at all was being presented (Tr. 54-56, 149-151, 200-201). Respondent used the excess manpower available to perform necessary general maintenance and repair work on the stage and related equipment in the South Shore Room, and employees worked shorter shifts (Tr. 54-56, 150-151).¹⁰ During the pre-election campaign and

⁹ The 1963 edition of the handbook, which the 1964 edition replaced, simply contained the following declaration regarding tokes (RX 32, pp. 19-20):

If you maintain Harrah's high standards of sincere friendliness, you will find that a number of customers will appreciate your attitude to the extent that you will be offered a gratuity, tip or "toke." These are acceptable and we are pleased to see you receive them if offered under the above circumstances.

¹⁰ The same policy existed in other departments as well, to the extent that when work in a department was slow or non-existent, excess personnel were afforded an opportunity to perform other jobs (R. 56; Tr. 531, 535, 505-506, 598-600). When

just afterwards, however, Company officials warned the stage technicians that the advent of the Union would result in a reduction in the number of stage technicians permanently employed, and that the Company would adopt a policy of calling for extra crewmen only as needed. See pp. 5-7, *supra*.

a. *The layoff of Allan Cole*

On January 16, 1964,¹¹ as the 2-week Mickey Rooney show in the South Shore Room was nearing its half-way point, Cole was summoned to Barkow's office (R. 56; Tr. 151-2). There Barkow and Vincent told Cole he was being laid off because he was the lowest in seniority of the stage technicians (R. 56; Tr. 152). Cole inquired whether his work had been unsatisfactory. Barkow and Vincent told him no, that he was being laid off as part of a general reduction in force and would be recalled if needed (R. 56; Tr. 152).

A week later Cole was recalled by Harrah's to help the stage technicians prepare for the forthcoming Eleanor Powell show (R. 56; Tr. 152). He worked only one day, and then was laid off until approximately February 7 (R. 56; Tr. 153). On the latter date Cole was again recalled, working this time for four weeks until his final termination on March 5 (R. 56; Tr. 153-4).

On the occasion of Cole's final layoff, no mention was made regarding the possibility of his being recalled as had happened on the two prior occasions.

a. permanent reduction in force was implemented in a department, personnel were laid off on the basis of seniority only if all other factors—such as experience and ability—were equal (R. 56; Tr. 73, 995-996, 998-999).

¹¹ All dates hereafter are in 1964 unless otherwise specified.

Respondent, however, offered "spasmodic" work to Cole on May 7, but this offer was rejected by Cole on May 8 (R. 59; Tr. 167; RX 8) as he wanted reinstatement to a steady job (RX 8). Respondent again offered employment to Cole by telegram dated June 11 (R. 59; Tr. 167-8; RX 9). The offer was only for two weeks' work, however, and was rejected by Cole the same day (R. 59; Tr. 168; RX 10). On July 1, respondent sent the following telegram to Cole (R. 59; Tr. 169, RX 11):

The resignation of Dick Ponts opens full time position on stage crew. Will you report for work by Sunday, July 5th, latest. Please answer via Western Union immediately.

On July 4, Cole declined because it was "impossible to give three days notice to present employer, lease our home here, move furniture and find apartment in July. Thanks for the offer but cannot accept at this time. Would need at least four weeks to prepare" (R. 47, n. 3; Tr. 170, RX 12).

b. The layoff of Bruce Lovelady

Bruce Lovelady, who had been made assistant stage manager in early 1963, was the lowest man in seniority next to Cole (R. 57; Tr. 50, 68). On March 5, shortly after his final discharge, Cole told Lovelady what had transpired (Tr. 66). Lovelady, concerned about the ability of the remaining technicians to cope with scenery constructed for the next show, went to see Barkow about the problem (Tr. 66). Lovelady explained the ramifications of Cole's layoff, and asked Barkow if he was sure the stage technicians could handle the work (Tr. 67). Barkow replied, "I don't

know" (Tr. 67). In disbelief Lovelady again said, "You do understand we haven't had any rehearsal time * * * Are you sure we can do it" (Tr. 67). Barkow again said he did not know, and asked Lovelady to step into his office (Tr. 67-68).

Inside the office Barkow said, "Since the question has come up, I might as well inform you that I am laying you off as well * * * This has absolutely nothing to do with your Union activities, it has nothing to do with your job or how well you have been doing your work whatsoever * * * As you know, we are having a Club-wide cutback and since you are the low man in seniority, you are the next man to go." Lovelady was now more puzzled: "Well, Arthur, I don't know how you can do this * * * We haven't had a rehearsal with the scenery * * * The way it is running right now you may need both Allan and I, and maybe in addition two additional men. What are you going to do tomorrow when you have rehearsal and you find out you need more men" (Tr. 68). Barkow replied, "If that is so, I will call you back" (Tr. 68). When asked, "Do you mean you are going to lay us off tonight, hold rehearsal tomorrow and call us back if you need us," Barkow said, "Yes" (Tr. 68). Lovelady was told to finish the work Barkow had assigned him and to do the paperwork on the following day (Tr. 69).

Following his discharge Lovelady received an offer for two weekends' employment at Harrah's (Tr. 82-83). Lovelady rejected the offer shortly thereafter (Tr. 84). Later, on June 21, Lovelady received another offer of employment from Harrah's—for two weeks' work commencing June 23 (R. 59; Tr. 81-82; GCX 5). This offer was also rejected on the follow-

ing day (R. 59; Tr. 84-85; GCX 6). Finally, on June 26, respondent sent Lovelady an offer stating a full-time position had opened and asking him to report for work by June 30 (R. 59; Tr. 86; GCX 7). Lovelady rejected the offer by telegram, which stated, "No mention of unconditional reinstatement or back-pay. The answer is no" (R. 48, n. 5; Tr. 86-7; GCX 8).

4. Respondent's refusal to bargain

On February 29, 1964, the Union requested that respondent bargain collectively pursuant to the Board's certification issued February 27, 1964. Respondent, from and after March 1, 1964, refused to bargain with the Union, claiming that the Board's certification was invalid and that it was improperly denied a hearing on its objections (R. 48, 54; GCX 1(g), paragraphs VII and VII; GCX 1(i)).

II. The Board's conclusions and order

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, concluded that it should assert jurisdiction over respondent (R. 84-85). The Board also concluded that respondent had violated Section 8(a) (3) and (1) of the Act by discharging employees Bruce Lovelady and Allan Cole because of their union activities (R. 84-86). The Board further concluded that respondent violated Section 8(a) (1), (3) and (5) of the Act by unilaterally prohibiting members of the stage crew from receiving tokens without bargaining with the employees' lawful representative and in reprisal for their union activities (R. 84-86). Additionally, the Board concluded

that respondent violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the employees' statutory representative (R. 84-86).

The Board's order requires respondent to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their protected rights (R. 85-86). Affirmatively, the Board's order requires respondent to offer full and immediate reinstatement to Cole and Lovelady to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss they may have suffered by reason of respondent's discriminatory conduct;¹² to bargain collectively with the Union upon request as the exclusive bargaining representative of all employees in the unit; to reinstitute the practice of tokening for the stage technicians as it existed prior to December 23, 1963, and to make whole all stage technicians for the losses of remuneration caused as a result of the withdrawal of the practice; and to post appropriate notices (R. 85-86).

¹² The Board agreed with the Trial Examiner's finding that respondent's telegraphic offers of reinstatement contained unreasonable reporting dates and that they were not valid offers of reinstatement. The Board rejected the Trial Examiner's conclusion that Cole's and Lovelady's failure to request an extension of the reporting times should be considered as evidence that the proposed dates did not influence their rejections of the offers, because "such a holding places an undue and unwarranted burden upon the discriminatee to make a counter proposal to Respondent's offer" (R. 47, n. 3, R. 48, n. 5, R. 85, n. 1). See *infra*, pp. 34-36.

ARGUMENT

I. The Board properly asserted jurisdiction over respondent

It is settled that the Board has discretionary authority to assert jurisdiction over Harrah's Club. *N.L.R.B. v. Harrah's Club*, 362 F. 2d 425, 427 (C.A. 9), cert. denied, 386 U.S. 915.

Following the Board's decision in the instant case, respondent filed a "Motion to Remand to Trial Examiner and Reopen Record," asking leave to adduce evidence "showing that the Board's assertion of jurisdiction over the gaming industry while declining to assert jurisdiction over racetracks is prejudicial to and in violation of the constitutional rights of the owners of the gaming industry" (R. 88). The motion was based upon this Court's decision in *N.L.R.B. v. Harrah's Club*, *supra*, wherein the Court said that to attack successfully the Board's assertion of jurisdiction, "it must also be shown that the gambling industry will be substantially prejudiced by Board regulation because racetracks are not similarly regulated [citation omitted]." 362 F. 2d at 427. We show below that the Board properly denied respondent's motion.

Respondent's motion is essentially one to adduce new evidence. But respondent has failed to show that it exercised "reasonable diligence to produce the facts at the original trial"—a showing necessary to support its motion. *N.L.R.B. v. Southern Bleachery & Print Works, Inc.*, 257 F. 2d 235, 241 (C.A. 4), cert. denied, 359 U.S. 911. Accord: *N.L.R.B. v. Carlisle Lumber Co.*, 94 F. 2d 138, 133 (C.A. 9), cert. denied, 304 U.S. 575; *N.L.R.B. v. Moss Amber Mfg. Co.*, 264 F. 2d 107,

110 (C.A. 9). Presumably, respondent would assert that it failed to adduce the evidence at the hearing because *N.L.R.B. v. Harrah's Club, supra*, was not decided until after the Board's decision in the instant case. It is readily apparent that this fact cannot excuse respondent's failure to come forth with evidence at the hearing. The decision in *N.L.R.B. v. Harrah's Club, supra*, does not enunciate a new principle of law. See, e.g., *N.L.R.B. v. Gene Compton's Corp.*, 262 F. 2d 653, 656 (C.A. 9). Respondent thus knew or should have known at the time of the hearing that it had to adduce pertinent evidence to support its claim of prejudice. The Court's decision in *N.L.R.B. v. Harrah's Club, supra*, therefore, cannot excuse respondent's failure to adduce at the hearing the evidence it seeks to adduce now.

Even if respondent's failure to adduce the evidence at the original hearing be overlooked, we submit that its motion was nevertheless properly denied. It is established beyond question that a motion to adduce additional evidence must state with particularity the evidence which is sought to be introduced, preferably by affidavits of the proposed witnesses, and show also exactly what will be proved thereby. *N.L.R.B. v. Southern Bleachery & Print Works, Inc., supra*, 257 F. 2d at 241 (C.A. 4); *N.L.R.B. v. Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 442 (C.A. 5).¹³ Respondent's

¹³ See *Brown v. Stapleton*, 216 Ind. 387, 24 N.E. 2d 909, 911-912; *Pearce v. Coogole, et al.*, 297 Ky. 194, 178 S.W. 2d 938, 939; *Thompson v. Shutz*, 309 Ky. 253, 217 S.W. 2d 315, 319; *Hake v. Youngs, et ux.*, 254 Mich. 545, 236 N.W. 858, 859; *Yeoman v. Kansas City*, 18 S.W. 2d 107, 109; *Clark v. Brown*,

motion fails to conform to these requirements. Respondent submitted no affidavits or otherwise specified what testimony it hoped to adduce. The motion merely states respondent's intention to "take the depositions" of the secretary of the National Association of State Racing Commissioners, and officers of various race-tracks around the country. No showing is made of how the testimony will aid respondent's claim, nor is there any indication of exactly what respondent hopes to show, beyond the general statement that "the Board's assertion of jurisdiction over the gaming industry * * * is prejudicial * * *" (R. 88). In light of the foregoing, we submit that respondent's motion was properly denied by the Board.

II. Substantial evidence on the record as a whole supports the Board's finding that respondent violated Section 8(a) (1), (3) and (5) of the Act by unilaterally prohibiting unit employees from receiving tokens

The stage technicians' unanimous selection of the Union as their exclusive bargaining representative in the election of October 14, 1963, climaxed an organizing drive marked by respondent's unfair labor practices. The hostility to the Union evident before the election was now transformed into resentment and vindictiveness toward the stage crew responsible

234 S.W. 2d 1013, 1014; E ——— v. G ———, 317 S.W. 2d 462, 469; *Walsh v. Butte, A & P Ry. Co.*, 109 Mont. 456, 97 P. 2d 325, 326; *Sheltra v. O'Rourke*, 51 R.I. 392, 155 Atl. 401, 402; *Schiano v. McCarthy Freight System, Inc.*, 65 A. 2d 462, 467; *Acer Realty Co. v. Comm. of Internal Revenue*, 132 F. 2d 512, 518 (C.A. 8); *Gorrien v. Jamison, et al.*, 200 Pac. 2d 488, 492. See also, *N.L.R.B. v. J. R. Simplot Co.*, 322 F. 2d 170, 172 (C.A. 9); *N.L.R.B. v. Parkhurst Mfg. Co., Inc.*, 317 F. 2d 513, 519 (C.A. 8).

for the Union's victory. Thus, on the day after the election, Robert Brigham, respondent's director of industrial relations, told a group of stage technicians that he did not like being "made a fool of," and "it may take me six to eight months to get even, but I will." Two days later, after first apologizing for his earlier statement, he said, "I am a vindictive man, and, believe me, what I said still goes. Within six to eight months this crew will be reduced 30 to 40 percent." At about the same time Robert Vincent, director of entertainment, told stage technician Loveady that respondent "would have done anything" to have defeated the Union, including firing Producer Barkow, Stage Manager Lein, and Chief Lighting Technician Vogt. Vincent later told stage technician Walker that his chances for a position with management were "washed up."¹⁴

¹⁴ As indicated in the Statement of Facts, the Trial Examiner granted the motion of counsel for the General Counsel and took judicial notice of these and other relevant facts litigated and found in the first *Harrah's Club* case. Before the Board, respondent asserted that it was prejudicial error for the Examiner to accept as fact those findings in the earlier case, and that counsel for the General Counsel should have been required to prove those facts anew. Under the doctrine of collateral estoppel, however, the Examiner's action was correct. * * * [M]atters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel." *Commissioner v. Sunnen*, 33 U.S. 591, 598. See also *Developments in the Law-Res Judicata*, 65 Harv. L. Rev. 818, 840 (1952). The Company's reliance on Section 7(d) of the Administrative Procedure Act (recently recodified as 5 U.S.C. § 556(e)) is without merit. The second sentence thereof states: "When an agency decision rests on official notice of a material fact not appearing in

Then, on December 23, 1963, a few weeks after the Regional Director issued his report recommending dismissal of respondent's objections to the election, the Company posted a notice prohibiting the stage technicians from accepting tokens from performers. Most performers tipped the stage technicians, in amounts ranging from \$20 to \$100 (Tr. 78, 162-164). During the course of a year a technician usually received from \$300 to \$600 in tokens—a not insubstantial sum (Tr. 78, 162, GCX 12). In addition to money, technicians occasionally received other items of value, such as wallets, key chains, cuff links and liquor. (Tr. 162-163). These gifts, too, were barred by the rule. Significantly, none of respondent's employees outside this bargaining unit who customarily received tokens, such as the wardrobe mistress, dealers, bartenders, waiters and waitresses, were forbidden by this notice to receive them (Tr. 78-81, 187, 253-254, 270-271, 935-936).

In view of the Company's previously declared intention to take reprisals against the technicians for voting for the Union, and in view of the fact that this

the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." Assuming that provision applies here, there is nothing in the record to show that the Company made a request "to show the contrary." In any event, Section 7(d) is inapplicable because it was not intended to alter or modify the body of judicial rules encompassed under the term *res judicata*. As stated in *Attorney General's Manual on the Administrative Procedure Act*, pp. 79-80 (G.P.O., 1947), this provision was simply intended to broaden the area of matters of which administrative agencies could take judicial notice, thus avoiding "laborious proof of what is obvious and notorious."

was the only group of employees singled out at this time for such action, the Board reasonably inferred that the prohibition against tokes was motivated by the Company's desire to punish the stage technicians for choosing to organize themselves.

Before the Board, respondent sought to justify its conduct by saying that the notice simply reiterated a policy against tokes for stage technicians which long antedated the advent of the Union. The Company asserted that such a policy had been expressed in its employee handbook "You and Your Job". It also pointed to the fact that it had expressly forbidden its chauffeurs to receive tokes in October 1962 (RX 42), and that toking was discouraged in the purchasing and advertising departments because of possible conflicts of interest (Tr. 766-768, 776-778, 967-968).

The Company's reliance on its handbook is unavailing. The edition in effect at the time the notice was posted stated with respect to tokes (RX 32, pp. 19-20):

If you maintain Harrah's high standards of sincere friendliness, courtesy and cheerfulness, you will find that a number of customers will appreciate your attitude to the extent that you will be offered a gratuity, tip or "toke". These are acceptable and we are pleased to see you receive them if offered under the above circumstances.

However, the Club will not tolerate any hints, suggestions or conniving by any employee that a tip is required or expected for any service. No favoritism or unusual attention is to be shown any customer with the expectation of receiving a tip.

It is readily apparent that nothing in the above-quoted language can reasonably be read to prohibit stage technicians from receiving tokens from performers. The handbook is simply silent on the point. This conclusion is buttressed by the fact that in a new edition of the handbook published in 1964, *after* the notice prohibiting the technicians from accepting tokens was posted, the following paragraph was added to the section on tipping (RX 33, pp. 24-25):

When a service is performed not for a customer but for someone doing contractual work for Harrah's and when Harrah's pays the employee specifically for performing such service, no token may be accepted by the employee for performing such service.

If respondent actually believed that the earlier edition of the handbook expressed a rule against stage technicians accepting tokens from performers, it would not have added this paragraph to make the point again.

The fact that employees in some other departments were barred from accepting tokens does not warrant a finding that a similar policy existed for the stage technicians. Indeed, Patrick France, vice president of public relations, admitted that, while there was a rule against purchasing and advertising department employees accepting tokens from persons with whom they did business, there was no such rule for stage technicians until the notice was posted in December 1963 (Tr. 970-971, 1024-1025). And finally, the absence of a no-toking rule for stage technicians is conclusively established by the undisputed fact, shown

supra, p. 9, that respondent's supervisors knew of the performers' practice to take the technicians, and generally were the ones who handed out the money on the performers' behalf.

The Company also claimed before the Board that it posted the "no taking" rule in December 1963 because there had been some dissension and bad feeling among the stage technicians in December 1962 when they learned that Stage Manager Lein had been given \$800 at the close of a show and he had not distributed any of it to the crew (R. 52; Tr. 693-694, 753-754, 784, 1442-1444, GCX 12). The record shows, however, that while company officials did not learn of this incident until October or November 1963 (R. 52; Tr. 753), they did not post the notice until the end of December. No explanation was offered for the delay in posting the notice. Moreover, there is no showing that there was still unrest among the technicians when respondent finally learned of the incident. Robert Brigham, director of industrial relations, testified that he asked "a couple of the crew members about it," and that they "told [him] so little [he] didn't press the investigation" (R. 52; Tr. 754). Nor did Company officials explain why they felt Lein's receipt of the \$800 made it necessary for them to post the "no taking" rule. France testified at the hearing that the money was not intended by the donor as tokens for the crew, but was payment to Lein personally for extra work he had performed for that show (R. 52; Tr. 1040, 1063-1064). Thus, any discontent and unrest among the stage technicians could have been dissipated by the

simple expedient of telling them that the money had not been for them, but for Lein alone.

The strained and contrived nature of the explanations offered by the Company, described above, only serves to confirm the reasonableness of the Board's conclusion "that the notice of December 23, 1963, to stage technicians regarding tokes and Respondent's action in thereafter prohibiting these employees from receiving them from performers was caused by and in retribution for their union activities" (R. 52). Such discriminatory conduct violates Section 8(a) (3) and (1) of the Act. *N.L.R.B. v. My Store, Inc.*, 345 F. 2d 494 (C.A. 7) cert. denied, 382 U.S. 927; *N.L.R.B. v. Zelrich Co.*, 344 F. 2d 1011, 1013-1014 (C.A. 5); *N.L.R.B. v. Citizens Hotel Co.*, 326 F. 2d 501, 504-505 (C.A. 5); *N.L.R.B. v. Toffenetti Restaurant Co., Inc.*, 311 F. 2d 219, 220 (C.A. 2) cert. denied, 372 U.S. 977; *Standard Generator Service Co. v. N.L.R.B.*, 186 F. 2d 606, 607-608 (C.A. 8).

The Company's conduct also violated Section 8(a) (5) and (1) of the Act because the "no-toking" rule was promulgated unilaterally and without consulting with the bargaining representative chosen by the employees. The receipt of tokes was a mandatory subject of bargaining because it was an emolument of value accruing to the stage technicians by reason of their employment, and which respondent had the power to permit or prohibit. *N.L.R.B. v. Central Illinois Public Service Co.*, 324 F. 2d 916, 919 (C.A. 7). See also, *N.L.R.B. v. Wonder State Mfg. Co.*, 344 F. 2d 210, 213 (C.A. 8); *N.L.R.B. v. Zelrich Co.*, *supra*, 344 F. 2d at 1013-1014; *N.L.R.B. v. United States Air*

Conditioning Corp., 336 F. 2d 275, 277 (C.A. 6); *N.L.R.B. v. Electric Steam Radiator Corp.*, 321 F. 2d 733, 736-737 (C.A. 6). Thus, the Company had an affirmative obligation to bargain with the Union before instituting the change. *N.L.R.B. v. Zelrich*, *supra* at 1014-1015; *N.L.R.B. v. Exchange Parts Co.*, 339 F. 2d 829, 831 (C.A. 5); *N.L.R.B. v. Citizens Hotel Co.*, *supra*, 326 F. 2d at 502-504; *N.L.R.B. v. Toffenetti Restaurant Co., Inc.*, *supra*, 311 F. 2d at 220; *Standard Generator Service Co. v. N.L.R.B.*, *supra*, 186 F. 2d at 607-608.

III. Substantial evidence on the record as a whole supports the Board's finding that respondent violated Section 8(a) (3) and (1) of the Act by laying off Cole and Lovelady because of their Union activities

Prior to the representation election on October 14, 1963, it was respondent's practice to keep all the stage technicians on the payroll all the time, even though they might not all be needed during a particular period of time (*supra*, p. 10, n. 10). During the slow periods, the Company used the excess manpower available to perform necessary maintenance and repair work on the stage and related equipment (*ibid.*).

During the pre-election campaign, however, no point was more clearly made to the technicians than that this practice would change if the Union won the election. On September 9, Stage Manager Lein told Lovelady that the stage technicians "would probably not all be kept on" if the Union got in. The same day, Producer Barkow told another technician that "the stage crew will be cut back because of the union activity." As we have already shown, *supra*, pp. 6-7 and

18-19, respondent's predictions became more specific following the election. On October 16, two days after the ballots had been counted, Robert Brigham, respondent's director of industrial relations, cautioned the employees that he was a "vindictive man" and that "within six to eight months this crew will be reduced 30 to 50 percent."¹⁵

Three months later, on January 16, 1964, stage technician Allan Cole was laid off by Barkow and Vincent while a show was in the middle of its run. The reason given for the layoff was that the number of stage technicians was being reduced as part of a club-wide reduction in force, and that Cole, as the lowest in seniority, was to be the first to go. He was also told that he would be recalled if needed. A week later, Cole was recalled for one day to help with the preparation for a new show, and on February 7, he was recalled again, working until his final layoff.

On February 27, the Board issued its decision overruling the Company's objections to the election and

¹⁵ As shown in more detail in the prior case against respondent, the employees had been warned that if the Union came in, not all of the technicians would be kept on all the time, but that the size of the staff would vary according to the needs of each particular show as those needs were determined by management. *Harrah's Club*, 150 NLRB 1702, 1706, 1707, 1714. Prior to the election, the Company had even posted a notice telling the employees that several years before, the Union had "recommended that Harrah's reduce the size of its permanent crew;" that "under an IATSE contract, it would be possible to end up with a basic crew of only *three* men;" and that "when-ever any other help is needed, the IATSE contracts dictate that the employer call the 'Hall' and put in a requisition" (150 NLRB at 1710, n. 16, italics in the original).

certifying the Union as the stage technicians' collective bargaining representative.

On March 5, at a time when the stage crew was building scenery to be used in a forthcoming show and there had not yet been an opportunity to rehearse with it, Cole was laid off for the last time. Within a matter of hours, Bruce Lovelady, the assistant stage manager, was also laid off by Barkow for the asserted reason that "we are having a Club-wide cutback and since you are the low man in seniority, you are the next man to go" (*supra*, pp. 12-13).¹⁶ Barkow assured Lovelady that the layoff had "absolutely nothing to do with [his] Union activities" or with the quality of his work, and that if it turned out that more crew members would be needed for the forthcoming show, he would be called back (*ibid.*).

¹⁶ Respondent claimed before the Board that Lovelady was a supervisor within the meaning of Section 2(11) of the Act. Lovelady was designated "assistant stage manager", but the record shows that this position was not a supervisory one. Thus, although Lovelady occasionally directed other employees in performing work, all stagehands on occasion directed the others, including Lovelady (Tr. 50-52, 145, 201-203, 237-238, 293). He acquired no extra duties when Lein announced he was assistant stage manager (Tr. 134). Lovelady was paid on the same basis as the other technicians, and received less pay than employee Ponts (Tr. 52). He had no authority to hire, transfer, suspend, layoff, recall, promote, discharge or recommend the discipline of other employees (Tr. 112-113). Lovelady prepared "cue sheets", which list scenery and prop movements necessary for the particular show, but the stage manager always had the responsibility of deciding whether the cues listed would be carried out (Tr. 137-139). The days-off schedule prepared by Lovelady was always submitted as a recommendation to the stage manager; the latter made the final

Respondent's openly expressed hostility toward the Union and its announced intention to reduce the size of the staff because the Union had been voted in, presents a *prima facie* case of illegal discrimination violative of Section 8(a) (3) and (1) of the Act when, just as threatened, a reduction in force was effected three to six months later. This conclusion is buttressed by the fact that respondent had already discriminatorily discharged the employee, Wetherill, who had presented the Union's recognition demand and filed the

decisions and frequently made changes in the schedule before posting it in final form (Tr. 139). If there was a discipline problem while the stage manager was absent Lovelady was not allowed to do anything about it—he merely reported it to his supervisors (Tr. 136). Even when the stage manager was on vacation, Lovelady might do his routine physical work but clearly was not invested with managerial discretion (Tr. 119). Indeed, Company officials specifically told Lovelady that he was not a supervisor and could not sign time slips (Tr. 119-120). Moreover, respondent itself included Lovelady's name in a list which included employees only and excluded all the admitted supervisors. See RX 34G. It is well settled that in these circumstances Lovelady cannot be classified as a supervisor. *N.L.R.B. v. Lindsay Newspapers, Inc.*, 315 F. 2d 709, 712 (C.A. 5) [sporadic exercise of supervisory authority does not turn an employee into a supervisor]; *N.L.R.B. v. Merchants Police, Inc.*, 313 F. 2d 310, 312 (C.A. 7) [must have power of supervision requiring the use of independent judgment to be a supervisor; reporting of dereliction of duty does not make one a supervisor]; *Precision Fabricators, Inc. v. N.L.R.B.*, 204 F. 2d 567, 568-569 (C.A. 2) [assignment of work to others from a list received from superior does not make one a supervisor]; *N.L.R.B. v. Griggs Equipment, Inc.*, 307 F. 2d 275, 279 (C.A. 5) [employer cannot make one a supervisor by new title]; *N.L.R.B. v. City Yellow Cab Co., et al.*, 344 F. 2d 575, 580-581 (C.A. 6) ["The responsibility of making assignments in a routine fashion does not transform an employee into a supervisor"].

representation petition,¹⁷ and it had reason to believe that Cole and Lovelady were also strong Union adherents. Thus, Cole had been the Union's observer at the election, prompting the then stage manager, Sy Lein, to remark, "Didn't I tell you Allan Cole * * * was one of the ringleaders?" (*supra*, p. 5); and Lovelady had attended the pre-election conference at the Board's Regional Office, after which Lein had told him that respondent considered him to be "on the Union's side" (*supra*, pp. 4-5).

Moreover, Barkow's defensive denial that Lovelady's union activities had anything to do with his layoff, warrants the inference that the opposite is the case, since it stands in patent contradiction to management's many threats to take just such retaliatory action if the employees voted the Union in. Barkow's assurance that Lovelady's layoff was not because of bad work raises a matter which further undercuts the credibility of the Company's justification for its action. For, Lovelady was considered by respondent to be the best stage technician it had. He had the title of assistant stage manager, and had been one of only two unit employees to receive year-end merit bonus checks just two months before (R. 53, 57; Tr. 73-75).¹⁸

¹⁷ See *Harrah's Club*, *supra*, 150 NLRB at 1720-1727, enf'd. 362 F. 2d at 428-430. There, too, respondent sought to justify the discharge on the ground that one man had to be let go, and Wetherill had the least seniority.

¹⁸ The other employee was Paul Jordan, who by the end of 1963 had been transferred out of the stage technician unit and made lounge manager (R. 53, 57; Tr. 74). When other unit employees complained about not getting a bonus, Entertainment Director Vincent offered to give one to any other stage tech-

In light of this fact, Lovelady's layoff simply for the asserted reason that he was "the low man in seniority" constitutes additional evidence that the layoff was discriminatorily motivated. The record shows that, for purposes of layoff, it was respondent's normal policy to give weight not only to seniority, but also to the Company's needs and the men's experience, skills and general employment record (Tr. 72-73, 995-996, 998-999). Under this test, it is hard to believe that Lovelady would have been selected for layoff. The inference is plainly warranted, therefore, that respondent's deviation from its normal practice by mechanically applying a seniority test with respect to Lovelady and Cole was motivated by a desire to gain retribution against two employees because of their support of the Union.

Before the Board, respondent sought to prove that the layoffs of Lovelady and Cole were unrelated to the unionization of its stage technicians, but in fact were part of its continuing efforts to keep costs down. The Board concluded that this reason was pretextual, and we submit that the record bears out that conclusion.

Brigham, the man who threatened the employees with a retaliatory reduction in force, testified that Cole was laid off in January "because of better supervision and better arrangements of work and better organizing of the whole procedure in the stage crew" (Tr. 708; see also Tr. 714). He further testified that

nician who was qualified to perform the various functions that Lovelady performed and could do them as well (R. 53; Tr. 75). While the names of other employees were suggested, none were found by management to come up to the standard set (*ibid.*).

the layoffs of Cole and Lovelady in March were for the same reasons, "plus the fact that the nature of the productions were simplified in an effort at economy" (*ibid.*).

The explanation offered for the January layoff hardly rings true, for Cole was laid off in the middle of a show's run, and he was recalled twice thereafter for more than four weeks' work before his final lay-off in March. That the March layoffs were not due to lack of work is evidenced by the fact that after the layoffs, the supervisors pulled cues and performed other technicians' work to an extent far greater than they had to do before (Tr. 241, 242, 245-246, 297, 405-406). Barkow also admitted to Lovelady at the time that he did not know if he could run the next show without him and Cole (Tr. 66-68). Moreover, it does not appear in what way the supervision had become "better" beginning in the middle of January. Barkow had been doubling as both producer and stage manager since stage manager Lein was discharged in November (Tr. 10043-10045). During this period of time, the remaining stage crew supervisors could hardly have been so efficient that respondent could also afford to be without the services of the assistant stage manager. That such an arrangement *was* unsatisfactory is attested by the fact that a new stage manager, Bushousen, was hired the following August (Tr. 957, 10044-10045). In view of the inconsistencies and contradictions involved in Brigham's testimony, the Board properly declined to give it any credence.

A slightly different explanation for the March layoffs was offered by France, the vice president in

charge of entertainment, publicity, special events and advertising. He testified that he ordered the Entertainment Department to simplify its productions in order to cut costs, and that he insisted that Barkow and Vincent "start now" instead of waiting for the next show, as they had requested (Tr. 994). Since, at that time, the performers were already contracted for¹⁹ and the props had already been built, it is apparent that the only avenue for cutting costs at that point was to lay off members of the crew. France knew that this would be the consequence of his directive, for Barkow and Vincent so advised him (Tr. 994-995).

Coming as it did just a few days after the Union's certification, it is a fair inference that France's order was discriminatorily motivated. France was openly opposed to the Union, and had made threats of reprisals and promises of benefits to some of the employees in an attempt to keep the Union out (*supra*, p. 8). Moreover, the most costly element in respondent's shows is the entertainers (Tr. 992). Since the latter part of 1962, respondent had been economizing in that sector by reducing the number of acts and getting less expensive entertainers (Tr. 947-950, 979-981, 986-987). In addition, respondent had long since adopted the practice of using fewer props (Tr. 952, 986). Until the layoff of Cole in January 1964, however, the only reduction in the number of full time stage technicians occurred when Paul Jordan was transferred to the position of lounge manager in November 1963 (R. 58; Tr. 976-977, 988, 1028). That

¹⁹ Such contracts are entered into 6 to 12 months in advance (Tr. 608, 946, 1037).

reduced the complement of employees from 11 to 10 (R. 58). At about the same time, Stage Manager Sy Lein was also terminated, further reducing the size of the staff (*ibid.*). In light of all the foregoing, France's insistence in early March that the staff be reduced even more, when the savings would be minimal and the increased burdens on the remaining crew members great, warrants the finding that "the layoffs stemmed from Respondent's strong opposition to the union activities of the stage technicians, and that the economy program was used as a pretext to accomplish these acts" (R. 57). It is reasonable to believe, as the Trial Examiner observed, that "if any further reductions would have occurred, absent the union activities of the stage technicians, they would have been accomplished by attrition, or by the reassignment of stage technicians to other positions" (R. 58).²⁰

In sum, respondent's declared hostility to the Union, its announced declaration of retaliatory intent, and the timing of the discharges, all furnish ample support for the Board's finding that Cole and Lovelady were discharged for their union activity. *N.L.R.B. v. Harrah's Club*, 362 F. 2d 425, 428-430 (C.A. 9), cert. denied, 386 U.S. 915; *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F. 2d 466, 470 (C.A. 9); *N.L.R.B. v. Victory Plating Works, Inc.*, 325 F. 2d 92, 93 (C.A. 9); *N.L.R.B. v. Idaho Potato Processors, Inc.*, 322 F. 2d 573, 575 (C.A. 9). While respondent may in fact have

²⁰ The record shows that when other departments suffered a reduction in force, respondent made an effort to find other positions for meritorious employees and frequently effected the reduction simply by not replacing employees who voluntarily quit (R. 56; Tr. 599-600, 897-898, 978, 1139).

saved money as a result of the discharges, "this success proves only that [respondent] realized an economic benefit from its anti-union activity," not that the discharges were motivated solely by the economy program. *N.L.R.B. v. Biscayne Television Corp.*, 337 F. 2d 267, 268 (C.A. 5). If the discharges were in part motivated by union activities, they fall within the prescription of Section 8(a) (3) and (1) of the Act. *N.L.R.B. v. Security Plating Co., Inc.*, 356 F. 2d 725, 727-728 (C.A. 9); *N.L.R.B. v. Mrak Coal Co., Inc.*, 322 F. 2d 311, 312-313 (C.A. 9); *N.L.R.B. v. Texas Independent Oil Co.*, 232 F. 2d 447, 450 (C.A. 9); *N.L.R.B. v. Wells, Inc.*, 162 F. 2d 457, 460 (C.A. 9). As we have demonstrated, such was the case here.

IV. The Board properly ordered respondent to offer reinstatement and backpay to Lovelady and Cole

After several offers of short-term work, respondent, on June 26, offered Lovelady employment, stating that a "full-time position" had opened and asking him to report by June 30 at the latest. Lovelady rejected this offer because it made no mention of unconditional reinstatement or backpay. Similarly, respondent twice offered Cole temporary employment and then, on July 1, wired him that a "full-time position" had opened on the stage crew and asked him to report by July 5 at the latest. Cole declined because the short notice did not give him time to move back to Tahoe, and said he "would need at least four weeks to prepare" (*supra*, p. 12).

The Trial Examiner found that while neither offer of reinstatement gave Cole and Lovelady a reasonable

period of time within which to report, the discriminatees' failure to "ask for or indicate that he would accept employment in a reasonable period" constituted a rejection of respondent's offer and denied an order directing respondent to reinstate these employees (R. 47, 48, nn. 3 and 5). The Board reversed the Examiner on the reinstatement issue, holding (R. 85, n. 1):

Unlike the Trial Examiner, * * * we do not consider Cole's and Lovelady's failure to request a reasonable extension of the reporting time as evidence that the proposed reporting dates did not influence their rejection of these offers because, in our opinion such a holding places an undue and unwarranted burden upon the discriminatee to make a counterproposal to Respondent's offer. The reinstatement obligation properly rests with Respondent and is satisfied only by a valid and unconditional offer of reinstatement. As we here conclude that Respondent's offers to Cole and Lovelady did not satisfy this obligation, we shall make provision for their reinstatement in our Order.

The Board's holding is clearly correct. It is well-settled that an offer of reinstatement which imposes unreasonable conditions upon the discriminatee is not valid. For example, where the offer requires that the employee work at a different and distant company facility (*N.L.R.B. v. Quest-Shon Mark Brassiere Co.*, 185 F. 2d 285, 290 (C.A. 2), cert. denied, 342 U.S. 812), or requires that the employee withdraw a previously filed unfair labor practice charge (*N.L.R.B. v. Kanmak Mills, Inc.*, 200 F. 2d 542, 544

(C.A. 3)), or would prevent the employee from testifying at a forthcoming hearing on unfair labor practice charges (*Mundet Cork Corp.*, 96 NLRB 1142, 1150-1151), it is not a valid offer of reinstatement. Similarly, where the offer imposes on unreasonably short reporting time upon the employee, it is invalid. *Fred E. Nelson, etc.*, 102 NLRB 780, 783, enforced, 208 F. 2d 230 (C.A. 3); *Thermoid Co.*, 90 NLRB 614, 615-616. Thus, the Board properly held that the offers of reinstatement here were invalid and ordered respondent to offer reinstatement to Cole and Lovelady. In not requiring that Cole and Lovelady propose alternate reporting dates the Board reasonably exercised its discretion to fashion remedies which effectuate the policies of the Act. See *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 197-200; *Bon Hennings Logging Co. v. N.L.R.B.*, 308 F. 2d 548, 555 (C.A. 9). As the Board noted, to impose upon the discriminatees the burden of making a counter-proposal would allow respondent to shift an obligation which properly rests with the party responsible for the discrimination.

V. Substantial evidence on the record as a whole supports the Board's finding that respondent violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the employees' exclusive bargaining representative

On February 27, 1964, the Board certified the Union as the employees' exclusive bargaining representative (GCX 2(g)). Two days later, the Union requested that respondent bargain with it pursuant to the certification, but respondent refused (GCX 1(g), paragraphs VII and VIII). Before the Board

the Company argued that the Union's certification was invalid because a post-election hearing should have been ordered to examine alleged union interference with the election. The contention is without merit.

Though Section 9(c)(1) of the Act (with exceptions not here relevant) affords the parties the right to a preelection hearing,²¹ no such right exists regarding a post-election hearing. Under the Board's rules,²² a post-election hearing is conducted only where "substantial and material factual issues exist which can be resolved only after a hearing." This practice has been uniformly approved by the Courts of Appeals. *N.L.R.B. v. Bata Shoe Co., Inc.*, 377 F. 2d 821 (C.A. 4); *N.L.R.B. v. J. R. Simplot Co.*, 322 F. 2d 170, 172 (C.A. 9); *N.L.R.B. v. Clearfield Cheese Co.*, 322 F. 2d 89, 93 (C.A. 3); *N.L.R.B. v. O.K. Van Storage, Inc.*, 297 F. 2d 74, 76 (C.A. 5); *N.L.R.B. v. Air Control Products*, 335 F. 2d 245, 249 (C.A. 5); *N.L.R.B. v. J. J. Collins Sons*, 332 F. 2d 523, 524 (C.A. 7); *N.L.R.B. v. National Survey Service, Inc.*, 361 F. 2d 199, 204-206 (C.A. 7). The policy of avoiding lengthy and unnecessary hearings comports with the implicit statutory requirement that "questions preliminary to the establishment of the bargaining relationship be expeditiously resolved." *N.L.R.B. v. O.K. Van Storage, Inc.*, *supra*, 297 F. 2d at 96 (C.A. 5). As pointed out in *N.L.R.B. v. Joclin*

²¹ The parties here waived their right to a preelection hearing by executing the Stipulation for Certification Upon Consent Election (GCX 2(b)). See Section 9(c)(4) of the Act, *N.L.R.B. v. Carlton Wood Products*, 201 F. 2d 863, 866-867 (C.A. 9).

²² Section 102.69(b), 29 C.F.R. § 102.69(b).

Mfg. Co., 314 F. 2d 627, 632 (C.A. 2), the Board's policy of "conditioning the right to a hearing on a showing that factual issues are 'substantial and material' [is] a requirement not only proper but necessary to prevent dilatory tactics by employers or unions disappointed in the election returns * * *." Thus, where the party seeking to overturn a representation determination fails to raise substantial and material issues of fact, it "has no cause for complaint when and if [its] demand for a hearing is denied." *N.L.R.B. v. O.K. Van Storage, Inc.*, *supra*, 297 F. 2d at 76. As we show below, respondent raised no factual issues which required a hearing.

In its objections to the election respondent alleged that the Union:

(1) induced employees to vote for it by promising them

(a) backpay allegedly due;

(b) jobs in other areas;

(c) it would prevent respondent from using less than 12 men on the stage crew;

(2) threatened to blacklist employees if they did not vote for the Union; and

(3) waived its rules and permitted the employees to join the Union on the condition that they vote for the Union.

In support of objection 1(a) respondent offered the affidavits of Robert Brigham and Justus L. Morrow. Morrow recounted a conversation with technician Larry Helderbrand, during which, according to Morrow, "Helderbrand said that 'if we go union we will get all of our back overtime pay' * * *. Helderbrand

did say that 'the union guaranteed' the foregoing 'if we go union.' He didn't say who in the union told him this" (RX 52H; RX 1(a)). Brigham's affidavit tells of a conversation he had with Morrow during which Morrow repeated the substance of what Helderbrand allegedly said (RX 1(f)).

It is readily apparent that Morrow's statement offers no direct evidence of union interference with the employees' freedom of choice. It is at best hearsay, and moreover is absolutely contradicted by the affidavit of Helderbrand himself. Thus, Helderbrand swore,

At no time did I tell Chuck Morrow, or anybody else, that if the union was voted in, I would collect backpay for overtime. I did say that if the union got in we would get the pay that was coming to us. I definitely never mentioned in any way to Morrow anything about any overtime pay.

At no time have I ever been told or promised the above by any union representative (RX 52 C).

The test of a valid election is whether there was conduct which made it impossible for the employees to register a free and untrammelled choice for or against a bargaining representative (*General Shoe Corp.*, 77 NLRB 124, 126). Since there is no direct evidence that the employees were subject to such conduct by the Union, and since there is direct evidence that they were not, the Board properly held that objection 1(a) raised no substantial and material issue of fact where based upon directly refuted hearsay. *N.L.R.B. v. Atkinson Dredging Co.*, 329 F.

2d 158, 164 (C.A. 4) cert denied, 377 U.S. 965; *N.L.R.B. v. O.K. Van Storage, Inc.*, *supra*, 297 F. 2d at 76 (C.A. 5).

Objection 1(b) was based on the affidavits of Justus Morrow and Morton King. Morrow reported that Helderbrand said the "union guaranteed" jobs elsewhere to men who lost their jobs at Harrah's (RX 52 H, RX 1(a)), but again this allegation was directly denied by Helderbrand's sworn statement—"At no time have I ever told Morrow that the union guaranteed us, or me, a job anywhere if we got laid off or fired at Harrah's. The union, and none of its representatives, has never made any such guarantee to me" (RX 52 C). King's affidavit reports that technician Jordan once said, "'* * * well, if anything happens to us here, we've got a job in Vegas'" (RX 1(c)). King states that Jordan did not say he had been promised a job by the Union, but King nevertheless "derived the definite impression" that such a promise had been made. Jordan clearly stated in his affidavit that he was never told that the Union would get or guarantee him a job elsewhere. They were only told that if they "wanted or had to leave Harrah's" that "there was work available in Las Vegas" (RX 52 E). The absence of a promise on the part of the Union to secure jobs for the technicians elsewhere was confirmed in affidavits made by Allan Cole (RX 52 B), Helderbrand (RX 52 C), Tony Himinez (RX 52 D), Lovelady (RX 52 H), Richard Ponts (RX 52 J), and Robert Wetherill (RX 52 K). In view of the overwhelming direct evidence that no promise of work elsewhere had been made, the Board properly overruled this

objection. *N.L.R.B. v. Atkinson Dredging Co., supra*, 329 F. 2d at 164 (C.A. 4); *N.L.R.B. v. O.K. Van Storage, Inc., supra*, 297 F. 2d at 76 (C.A. 5); *Oates Bros., Inc.*, 127 NLRB 1674.

Objection 1(c) is based upon the affidavits of Brigham and Morrow. Morrow claimed that Helderbrand, a few days *after* the election, remarked, “ ‘ * * * it is a cinch that none of us will lose our jobs now that the union is voted in’ ” (RX 52 H). Brigham’s affidavit recounts his conversation with Morrow wherein Morrow was said to have stated that he (Morrow) learned from Helderbrand that “the Union would see that the crew was maintained at twelve (12) men” (RX 1(f)). Brigham also said two other stage technicians, whose names he could not recall, made the same statements to him. Robert Stirling’s affidavit reports a remark similar to that which Morrow attributes to Helderbrand in his (Morrow’s) affidavit. According to Stirling, a week after the election Paul Jordan said that he (Jordan) would not have to worry about being fired—the crew was protected. Jordan, in his affidavit, denied being told that the Union would see to it that the stage crew was not cut if he voted for the Union. The subject was mentioned by the Union only as a topic for negotiation (RX 52 E). Helderbrand also denied ever being told that the Union would guarantee to keep the crew at 12 men (RX 52 C). Here also the absence of such promises on the part of the Union is confirmed by the affidavits of Allan Cole (RX 52 B), Tony Himinez (RX 52 D), Bruce Lovelady (RX 52 G), William Murray (RX 52 I), Richard Ponts (RX 52 J), and Robert Weth-

erill (RX 52 K). It could hardly be contended that respondent's inferences based upon directly refuted hearsay present a substantial and material issue of fact.

The affidavits of Jacques Vogt and Robert Brigham form the basis for objection 2. Vogt described a conversation he had with Allan Cole, wherein Cole remarked that it was difficult to find work as a stagehand without a union card. From this conversation Vogt "inferred rather clearly" that Cole had "derived his view" about the Union from union representatives (RX 1(d)). Brigham reported that Richard Ponts told him that he had to vote for the Union because he could not get a job elsewhere without a union card. Brigham also said that Lovelady had once said that he (Lovelady) was convinced a stagehand could not work elsewhere without a union card. Cole, in his affidavit, recalled telling Vogt that he had voted for the Union because, among other reasons, he thought it was hard to find work elsewhere without belonging to the Union. But, Cole stated, "I did not say or imply in any way that my support of the union or vote for the union was contingent upon my getting an IATSE card" (RX 52 B). Lovelady denied having told Brigham that he was ever told or convinced that he had to have a union card to work elsewhere. "At no time has any IATSE representative told or promised me that if I did not vote for the union I would not be able to get work anywhere in the business or that I would not get an IATSE card" (RX 52 G). Ponts also denied making the statements attributed to him. He said, "I did not say at any time to anybody that I

had to vote for the union because I could not get a job anywhere else in the business without a card" (RX 52 J). Ponts did admit believing that it was very difficult to find work without a union card. The affidavits of other technicians show that the Union never made such threats. RX 52 I, RX 52 G, RX 52 F, RX 52 E, RX 52 D. It is readily apparent that no substantial and material issue of fact was raised by respondent. Here again respondent relies upon inferences drawn from hearsay, which inferences are directly contradicted by the alleged declarants.

The last objection raised by respondent was that the Union waived tests, initiation fees and other entrance requirements conditioned upon the applicants' voting "yes" in the election. Support for the objection is offered in the affidavit of Richard Lusiani (Lane). Lusiani said that Jordan had told him that he (Jordan) had paid \$61 for a union card. Jordan, according to Lusiani, said he did not have the card, that Union business representative Robert Wetherill had kept it. Lusiani "drew the inference" that Wetherill was keeping the cards to coerce the employees to vote for the Union (RX 1(e)). Jordan's affidavit explains Lusiani's incorrect inferences. The Union's fees were \$100 for initiation, plus 1 year's dues, \$36, to be paid in advance. Jordan, at the time of his conversation with Lusiani, had paid the full \$36 in dues, as well as \$25 toward the \$100 initiation fee. The balance was due by the first of January 1964. Jordan also stated that Wetherill was in possession of the card because Jordan had specifically requested him to keep it—Jordan "did not

want to be compromised by having the card * * *” (RX 52 E). Jordan’s affidavit indicates that the deferred payment arrangement was not held out as an inducement, and was available to all on an equal basis (RX 52 E). Jordan’s statements are borne out by the affidavits of other stagehands. RX 52 B, RX 52 D, RX 52 G, RX 52 I, RX 52 J. It is also clear from the affidavits that the Union never offered to waive tests or other conditions to obtaining membership. RX 52 B, RX 52 D, RX 52 E, RX 52 G, RX 52 I, RX 52 J, RX 52 K. Thus, once more, it is apparent that the Board properly overruled respondent’s objection based upon inferences from expressly denied hearsay.

Clearly, in all of its objections, respondent failed to raise a substantial and material issue of fact which warranted a hearing. The Board’s certification of the Union was therefore valid, and respondent was obliged to honor that certification and bargain with the Union on behalf of the stage technicians.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

ARNOLD ORDMAN,

General Counsel,

DOMINICK L. MANOLI,

Associate General Counsel,

MARCEL MALLET-PREVOST,

Assistant General Counsel,

SOLOMON I. HIRSH,

ROBERT M. LIEBER,

Attorneys,

National Labor Relations Board.

SEPTEMBER 1967.

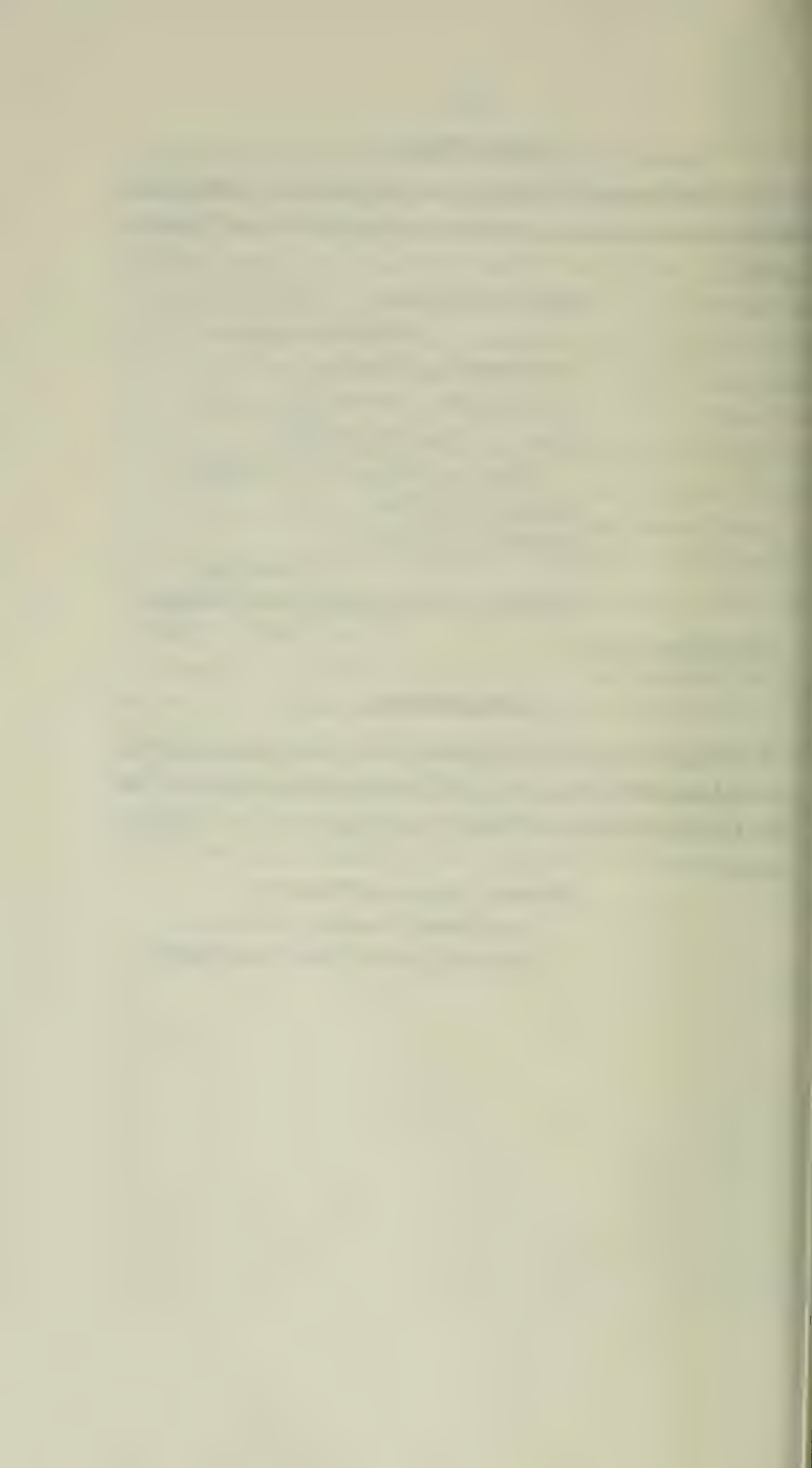
CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,

Assistant General Counsel,

National Labor Relations Board.



APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(11) The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9.

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election

by secret ballot and shall certify the results thereof.

* * * * *

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in

the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record * * *

APPENDIX B

This Appendix is prepared pursuant to Rule 18(f) of the Rules of this Court. References are to pages of the original transcript of record ("Tr.").

General Counsel's exhibits

No. (pages)	Identified	Offered	Received in evidence
a) through 1(p).....	4	4	4
a) through 2(g).....	12	5	12
.....	32	33	401
a) through 4(u).....	42	42	45
.....	82	82	84
.....	85	85	86
.....	86	86	86
.....	87	87	87
.....	467	508	(rejected p. 508)
(a) through 10(e).....	468	508	(rejected p. 508)
.....	915	916	916
.....	1437	1438	1440

Respondent's exhibits

No.	Identified	Offered	Received in evidence
a) through 1(f).....	15	15	(rejected p. 15)
.....	16	16	(rejected p. 16)
.....	36
.....	47	48	48
.....	9	100	100
.....	103	177	178
.....	104	179	180
.....	167	167	167
.....	167	168	168
.....	168	168	169
.....	169	169	169
.....	170	170	170
(a) through 13(b).....	349, 398, 701	699	701
.....	365	366	367
.....	366	366	367
.....	384	384	385
(a) through 17(b).....	385	386	386
.....	387	387	394

No.	Identified	Offered	Received in evidence
19.....	388	389	394
20.....	389	(not offered)	394
21(a) through 21(b).....	390	391	394
22.....	511	512	512
23.....	512	(not offered)	513
24.....	513	514	514
25.....	514	515	515
26.....	515	516	516
27.....	517	517	517
28.....	517	518	518
29.....	525	526	526
30.....	687	687	688
31.....	688	689	689
32.....	691	695	696
33.....	692	695	696
34(a) through 34(g).....	714	717	717
35.....	718	718	718
36(a) through 36(b).....	719	720	722
37.....	722	724	725
37-A.....	1200	1201	1201
38.....	726	726	728
38-A.....	1177	1180	1181
38-B.....	1562	1562	1562
39.....	729	730	731
40.....	844	847	847
41.....	851	(not offered)	857
42.....	857	859	859
43.....	1089	1094	1095
44.....	1091	1094	1095
45.....	1092	1094	1095
46.....	1133	1561	1561
47.....	1186	1189	1192
47-A.....	1402	1403	1404
48-A through 48-F.....	1192	(not offered)	1199
49.....	1201	1202	1203
50.....	1203	1204	1205
51.....	1217	1218	1218
52-A through 52-K.....	1345	1345	(rejected p. 1345)
53-A.....	1404	1405	1422
53-B.....	1563	1562	1563
54.....	1422	1426	1426
55-A through 55-F.....	1563	1563	1563
56.....	1563	1563	1564

No. 21689

In the
United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,	}
vs.	
HARRAH'S CLUB,	
	<i>Petitioner,</i>
	<i>Respondent.</i>

Brief for Respondent

FILED

DEC 21 1967

SEVERSON, WERSON, BERKE & BULL
NATHAN R. BERKE

433 California Street
San Francisco, California 94104

Attorneys for Respondent

WM. B. LUCK, CLERK

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

DEC 27 1967

SUBJECT INDEX

	Page
Introduction and Issues Presented.....	1
Argument	4
I. The Board Arbitrarily Refused to Reopen the Record and Receive Evidence on the Jurisdictional Issue.....	4
II. Respondent Should Have Been Granted a Hearing on Its Objections to Election.....	7
A. The Background and the Facts Pertaining to the Board's Arbitrary Treatment of the Objections.....	7
B. The Evidence Which Warranted Setting Aside the Election or at a Minimum Required a Hearing.....	11
1. Objection 1(a)	11
2. Objection 1(b)	15
3. Objection 1(c)	16
4. Objection 2	17
5. Objection 3	18
C. The Board's Rules and Regulations and the Court Decisions Require a Hearing.....	20
1. The 8(a)(5) Finding Cannot Stand.....	20
D. A Hearing Would Have Supported Respondent's Objections and Required the Election to Be Set Aside	22
III. The Layoff of Cole and Lovelady Was Not Discrimi- natory	23
A. Respondent's Economy Program.....	23
B. The Effect of the Cost Reduction on the Entertain- ment Department	25

	Page
C. The Facts as to the Layoff of Cole and Lovelady....	27
1. Cole	27
2. Lovelady	28
D. The Cost Reduction Program Cut Across All of Respondent's Operations	28
E. The Evidence Supports Respondent's Reason for the Layoffs	31
IV. Respondent Properly Enforced Its Policy with Respect to Tokes From Entertainers.....	34
A. The Policy and the Withdrawal of Tokes.....	34
B. Contrary to the Board, Respondent's Policy Applied to All Departments.....	37
1. The Trial Examiner's Interpretation of the Policy Required a Finding of No Violation of the Act	37
C. Respondent Had Good Cause to Remind the Stage Technicians of Its Policy Respecting Tokes.....	39
1. The Board and the Trial Examiner Make Un- founded Findings and Statements on This Issue	40
D. The Toke Policy Is Not a Bargainable Issue.....	43
1. They Were Not Part of Wages Nor Terms and Conditions of Employment.....	43
E. The Board's Remedy with Respect to Tokes Is Beyond Its Power and Unenforceable.....	48
V. The Board's Findings Are Not Supported By Sub- stantial Evidence	49
A. The Trial Examiner's and the Board's Reliance on Findings in Another Case Was Erroneous and Prejudicial	49

SUBJECT INDEX

iii

Page

B. Assuming, Arguendo, the Statements Found in the Prior Case Were Made They Do Not Support a Finding of Discrimination in This Case.....	55
C. Neither the Trial Examiner Nor the Board May Second-Guess Management	57
D. The Board Ignores the Applicable Standards of Judicial Review	59
E. Lovelady Is a Supervisor Within the Meaning of the Act and Therefore Not Entitled to the Protection of the Act.....	63
VI. The Trial Examiner, Contrary to the Board, Correctly Concluded That Cole and Lovelady Rejected Respondent's Valid Offer of Reinstatement.....	65
A. The Offer to Cole.....	65
B. The Offer to Lovelady.....	66
C. The Board's Finding Is Unsupportable.....	67
Conclusion	71
Certificate	71

TABLE OF AUTHORITIES CITED

CASES	Pages
Crawford Mfg. Co. v. NLRB (C.A. 4, Oct. 27, 1967)	
F.2d, 66 LRRM 2529.....	63
Fred E. Nelson, etc., (1953) 102 NLRB 780.....	68
General Shoe Corp., (1948) 77 NLRB 124.....	14
Hock & Mandel Jewelers, (1963) 145 NLRB 435.....	70
Home Town Foods, Inc. v. NLRB (1967) 379 F.2d 241.....	14, 15
H. W. Elson Bottling Co., (1965) 155 NLRB 714.....	63
Indiana Metal Products Corp. v. NLRB, (C.A. 7, 1953) 202	
F.2d 613	59
Jacobsen v. NLRB (C.A. 3, 1941) 120 F.2d 96.....	6
Kitty Clover, Inc., (1953) 103 NLRB 1665.....	70
Knickerbocker Plastic Co., Inc., (1961) 132 NLRB 1209.....	70
Labue Bros., 109 NLRB 1182.....	22
Nashville Display Co., (1951) 93 NLRB 1310.....	69
National Labor Rel. Bd. v. L. Ronney & Sons Fur. Mfg. Co.	
(C.A. 9, 1953) 206 F.2d 730.....	70
National L. R. Bd. v. Wooster Div. of B-W Corp. (1958)	
365 U.S. 342, 78 S. Ct. 718.....	44, 45
Nevada Tank & Casing Co., (1961) 131 NLRB 1352.....	69
NLRB v. Bata Shoe Company, (C.A. 4, 1967) 377 F.2d 821....	20, 21
NLRB v. Bill Daniels, Inc. (C.A. 6, 1953) 202 F.2d 579,	
reversed on other grounds, 346 U.S. 918, 74 S. Ct. 305.....	54
NLRB v. Capital Bakers, Inc., (C.A. 3, 1965) 351 F.2d 45.....	12
NLRB v. Central Illinois Public Service Company, (C.A. 7,	
1963) 324 F.2d 916.....	45
NLRB v. Citizen-News Co. (C.A. 9, 1943), 134 F. 2d 970....	56, 61, 62
NLRB v. Citizens Hotel Co., (C.A. 5, 1964) 326 F.2d 501.....	45
NLRB v. Council Manufacturing Corp. (C.A. 8, 1964), 334	
F.2d 161	56

TABLE OF AUTHORITIES CITED

v

Pages

NLRB v. Davison, (C.A. 4, 1963) 318 F.2d, 550.....	44
NLRB v. Edward G. Budd Mfg. Co. (C.A. 6, 1948), 169 F.2d 571, cert. den., 335 U.S. 908.....	65
NLRB v. Electric Steam Radiator Corporation, (C.A. 6, 1963) 321 F.2d 733.....	45
NLRB v. Englander Company (C.A. 9, 1958), 260 F.2d 67....	60
NLRB v. Exchange Parts Company, (C.A. 5, 1965) 339 F.2d 829, 831	45
NLRB v. Falls City Creamery Co. (C.A. 8, 1953) 207 F.2d 820	56
NLRB v. Flotill Products (C.A. 9, 1950) 180 F.2d 441.....	48
NLRB v. Fullerton Publishing Company (C.A. 9, 1960), 283 F.2d 545.....	63
NLRB v. Gala-Mo Arts, Inc. (C.A. 8, 1956), 232 F.2d 102....	60
NLRB v. Gilmore Industries, Inc., (C.A. 6, 1965) 341 F.2d 240	22, 23
N.L.R.B. v. Gorbea, Perez & Morell, S. en C. (C.A. 1, 1964) 328 F.2d 679.....	22, 23
NLRB v. Harrah's Club, 362 F. 2d 245.....	2, 4, 5
NLRB v. Hart Cotton Mills (C.A. 4, 1951), 190 F.2d 964.....	60
NLRB v. Hod Carriers, Local 1082, (C.A. 9, 1967)	
F.2d, 66 LRRM 2333.....	44
NLRB v. Johnnie's Poultry Co., (C.A. 8, 1965), 344 F.2d 617	56
NLRB v. Johnson, (C.A. 6, 1962) 310 F.2d 550.....	54
NLRB v. Katz, (1962) 369 U.S. 736, 82A S. Ct. 1107.....	45
NLRB v. Late Chevrolet Co., (C.A. 8, 1954), 211 F.2d 653	56
NLRB v. Leland-Gifford Co., (C.A. 1, 1952), 200 F.2d 620.....	65
NLRB v. Lord Baltimore Press, Inc., (C.A. 4, 1962) 300 F.2d 671	21
NLRB v. McGahey, (C.A. 5, 1956), 233 F.2d 406.....	59, 60, 61, 62
NLRB v. Montgomery Ward & Co. (C.A. 8, 1946), 157 F.2d 486	59, 61
NLRB v. My Store, Inc., (C.A. 7, 1965) 345 F.2d 494, cert. denied, 382 U.S. 927.....	45
NLRB v. Poinsett Lumber & Mfg. Co. (C.A. 4, 1955) 221 F.2d 121	21
NLRB v. Sebastopol Apple Growers Union, (C.A. 9, 1959), 269 F.2d 705.....	57, 58, 60
NLRB v. Southern Bleachery & Print Works (C.A. 4, 1958) 257 F.2d 241.....	5

	Pages
NLRB v. Tex-O-Kan Flour Mills Co., (C.A. 5, 1941) 122 F.2d 433	6
NLRB v. Toffenetti Restaurant Company, Inc., (C.A. 2, 1962) 311 F.2d 219, cert. denied, 372 U.S. 977.....	45
NLRB v. Trancoa Chemical Corporation, (C.A. 1, 1962) 303 F.2d 456.....	14
NLRB v. United States Air Con. Corp., (C.A. 6, 1964) 336 F.2d 275	45
NLRB v. Wagner Iron Works, (C.A. 7, 1955), 220 F.2d 126	59
NLRB v. West Point Mfg. Co. (C.A. 5, 1957), 245 F.2d 783....	60
NLRB v. Wonder State Manufacturing Company, (C.A. 8, 1965) 344 F.2d 210.....	45, 46
NLRB v. Zelrich Company (C.A. 5, 1965) 344 F.2d 1011.....	45
Ohio Power Co. v. NLRB (C.A. 6, 1949), 176 F.2d 385.....	65
Osecola Co. Co-op Cream. Ass'n. v. NLRB (C.A. 8, 1958), 251 F.2d 62	60, 61
Paramount Cap Manufacturing Company v. NLRB, (C.A. 8, 1958) 260 F.2d 109.....	55
Pittsburg Plate Glass Co. v. NLRB, (1941) 313 U.S. 146, 61 S.Ct. 908.....	21
Republic Steel Corporation v. NLRB, (1940) 311 U.S. 7, 11-12, 61 S. Ct. 77.....	48
Research Designing Service, Inc. (1963), 141 NLRB 211.....	65
Sewell Mfg. Co., (1962) 138 NLRB 66.....	22
Standard Generator S. Co. v. National Labor Rel. Bd., (C.A. 8, 1951) 186 F.2d 606.....	45
Thermoid Co., (1950) 90 NLRB 614, 615.....	68
Truck Drivers and Helpers, Local Union 568 v. N.L.R.B., (C.A.D.C., 1967) 379 F.2d 137.....	23
United Packinghouse Workers of America, CIO v. NLRB (C.A. 8, 1954), 210 F.2d 325.....	60
United States Rubber Company v. NLRB, (C.A. 5, 1967) 373 F.2d 602	21

TABLE OF AUTHORITIES CITED

vii

Pages

Universal Camera Corp. v. NLRB, (1951) 340 U.S. 474, 71 S. Ct. 456.....	43, 54, 57, 60
V.L.B. Hosiery Co., Incorporated, (1952) 99 NLRB 630.....	70
White Sulphur Springs Company v. NLRB, (C.A.D.C., 1963) 316 F.2d 410.....	69
Winn-Dixie Greenville, Inc. v. N.L.R.B., (1967) S. Ct.....	54, 55
W. W. Cross & Co., Inc. v. NLRB, (C.A. 1, 1949) 174 F.2d 875	46

STATUTES

29 C.F.R. §102.69(c) and (e).....	20
29 U.S.C.A. §160(c).....	48
5 U.S.C. §556(e).....	54

No. 21689

In the
United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,	}
<i>Petitioner,</i>	
vs.	
HARRAH'S CLUB,	}
<i>Respondent.</i>	

Brief for Respondent

INTRODUCTION AND ISSUES PRESENTED

This case presents a classic example of a lengthy and costly Board proceeding which never should have been brought to hearing under any objective standard. The shallowness of the Board's case is illustrated in the unduly prolix record made so by (1) constant interruptions throughout the hearing by the unreasonable demands of the General Counsel's representative upon Respondent to prepare and produce records which he hoped would support his contentions and (2) repetitious questioning and cross-examination without limit by the General Counsel's representative. As the Trial Examiner observed, he had not tried a Board case where there was "so much trivia in

the General Counsel's case" and where there was "just seraping the bottom of the barrel to find something" to tie to an unfair labor practice. (Tr. 893-894)

The issues presented are:

1. Whether the Board should have reopened the record on Respondent's timely motion following this Court's decision in *NLRB v. Harrah's Club*, 362 F. 2d 245, to permit Respondent to introduce evidence to establish substantial prejudice by the Board's assertion of jurisdiction. We shall show that it should have. (*infra* I)

2. Whether the Board should have granted Respondent a hearing on its objections filed in the representation election proceedings which raised substantial and material issues of fact. We shall show that the Board should have set aside the election or, at least, granted a hearing on the objections. (*infra* II)

3. Whether the lay-off of Cole and Lovelady was discriminatory. We will clearly show that the lay-offs were occasioned solely by an economy program affecting all of the departments in Respondent's organization. (*infra* III)

4. Whether the enforcement of Respondent's policy against the acceptance of tokens (tips) by the stage crew from entertainers was discriminatory. We shall show Respondent had this policy long before the Union was ever in the picture and that the Board's findings and conclusions here, too, are without substantial support in the record. In addition, on this issue, we shall show as a matter of law that tokens are not a mandatory bargaining subject and they are not wages or terms and conditions of employment.

We shall also discuss the Board's remedy in this respect and show that it is unenforceable. (*infra* IV)

5. Whether there is substantial evidence for the Board's holding that there were such violations of the Act. We will see that the Board in making its findings used findings in another case not as background, but as evidence to make its findings and conclusions of discrimination. And that without the use of such other findings the Board's findings and conclusions in this case are completely lacking in evidentiary and legal support. We shall also discuss the evidence relating to the supervisory status of Lovelady. We shall on this score point out the evidence which establishes as a matter of fact and under the definition in the Act that he was a supervisor and, therefore, without the protection of the Act. (*infra* V)

6. Finally, we will discuss whether Respondent's offer of permanent full time employment to Cole and Lovelady after an opening developed, was a valid and unconditional one. The Trial Examiner found that it was and that Cole and Lovelady had rejected the offer. He concluded Respondent had properly fulfilled its obligation. The Board disagreed. We shall show the Trial Examiner's conclusion was correct and the Board was in error. (*infra* VI)

Questions pertaining to the lay-offs, the token policy, the Board's refusal to set aside the election or grant a hearing on the objections and Lovelady's supervisory status can be analyzed intelligently only by reviewing the extensive record. We regret that for such reason and because of the Board's intransigent position and sketchy presentation, this brief, too, will be extensive. We trust it will prove helpful to the Court.

Argument

I.

THE BOARD ARBITRARILY REFUSED TO REOPEN THE RECORD AND RECEIVE EVIDENCE ON THE JURISDICTIONAL ISSUE

In a prior case involving Respondent, *N.L.R.B. v. Harrah's Club*, (C.A. 9, 1966) 362 F. 2d 425, this Court held that the Board could assert its jurisdiction over gaming. In so ruling, this Court said, at 427:

“Assuming that the criteria applied by the Board in determining to exempt racetracks from regulation are equally applicable to gambling casinos in Nevada, this alone is not sufficient to establish that regulation of the gambling industry will result in unjust discrimination. It must also be shown that the gambling industry will be substantially prejudiced by Board regulation because racetracks are not similarly regulated . . .”

The opinion of this court was rendered on June 14, 1966. On June 20, 1966, Respondent filed a motion with the Board in the instant case to remand to the Trial Examiner and to reopen the record solely for the purpose of receiving evidence on the jurisdictional issue to establish substantial prejudice by reason of the Board's regulation of gaming and because it does not similarly regulate racetracks. The motion recited the nature of the evidence to be adduced. Such evidence included depositions to be taken of the secretary of the National Association of State Racing Commissioners, of officials of various racetracks which were named in the motion. The nature and purpose of the evidence was also stated in the motion. (R. 87-88) On July 18, 1966, without giving any reason therefor, the Board by order denied the motion “as lacking in merit.” (R. 90)

It is to be noted that the Board did not deny the motion on any ground other than it lacked “merit”. For the first time the Board argues in its brief that Respondent should

have come forward with its evidence at the hearing. (Br. 17) It will be remembered that this Court's decision had not yet come down when the hearing was held in 1965. (R. 45) Until this Court's decision, Respondent was unable to determine what would be required of it either by way of proof to establish "substantial prejudice" a phrase used for the first time by this Court or whether any proof at all would be necessary. As Chief Judge Chambers said at the argument, this matter of jurisdiction was very "fuzzy". When Respondent learned of this Court's view, it promptly filed its motion with the Board.

The Board further argues for the first time in its brief that the motion was properly denied because it did not state with particularity the evidence which was sought to be introduced. (Br. 17) Respondent in its motion referred to this Court's opinion in *N.L.R.B. v. Harrah's Club, supra*, and stated that such evidence "will bear upon the issue of jurisdiction and will be directed toward showing that the Board's assertion of jurisdiction over the gaming industry while declining to assert jurisdiction over racetracks is prejudicial to and in violation of the constitutional rights of the owners of the gaming industry." The Board at the time apparently had no trouble with knowing the nature and the purpose of such evidence or what it would prove. It did not deny the motion on any technical ground such as is now asserted for the first time. It denied it "as lacking in merit."

The decisions cited in the Board's brief are completely inapplicable. *NLRB v. Southern Bleachery & Print Works* (C.A. 4, 1958) 257 F.2d at 241, dealt with a situation where evidence completely in possession of the respondent was not adduced at a prior hearing, but was sought to be introduced at another hearing. The respondent in that case made

no request for an opportunity to produce such evidence in the prior case. The Board in upholding the Trial Examiner who had rejected the proffered evidence in the second case did so on the ground that "the offer was primarily an effort to reopen a question which had been decided by the Board at the representation hearing." *NLRB v. Tex-O-Kan Flour Mills Co.*, (C.A. 5, 1941) 122 F.2d 433, 442 involved a witness who had been subpoenaed but did not appear. Respondent in that case made no request for delay because of his absence. The Board there denied the respondent's subsequent motion to reopen the case to take his testimony.

Nor do the cases cited in the footnote in the Board's brief help the Court. (Br. 17, n. 18)

A case applicable is *Jacobsen v. NLRB* (C.A. 3, 1941) 120 F.2d 96, 100 in which there was sought to be adduced additional evidence on commerce (jurisdiction). The Board had refused to reopen the record and take additional testimony. Subsections 10(e) and (f) of the Act were construed on an application to the Court, in a review of the Board case, for leave to adduce additional evidence. The Court stated:

"Subsection (e) provides, inter alia: 'If either party shall apply to the Court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board . . . the court may order such additional evidence to be taken before the Board.'

The court then states:

"We conclude that upon petition for review of a final order of the Board either party may petition the

court for leave to adduce additional evidence upon any pertinent issue and the court may excuse the failure of the party to adduce such evidence if it is material and that there were reasonable grounds for the failure of the party to adduce it before the Board. In so holding we are not unmindful of the express provisions of subsection (e) which state that after hearing . . . in its discretion, the Board upon notice may take further testimony or hear argument . . . That subsection cannot limit the power of a court of appeals, acting pursuant to . . . subsections (e) and (f), to require the Board to take additional evidence . . .”

We hereby request the Court to order the Board, for the reasons given both to the Board and this Court, to reopen the record to take the evidence described in Respondent's motion to the Board. (R. 87-88) Clearly, such evidence is material.

II.

RESPONDENT SHOULD HAVE BEEN GRANTED A HEARING ON ITS OBJECTIONS TO ELECTION

A. The Background and the Facts Pertaining to the Board's Arbitrary Treatment of the Objections.

An election was conducted by the Board on October 14, 1963. Of the twelve eligible voters, eleven cast votes for the union, there were no votes against the union, and there was one challenged ballot. (GCX 2(d)) In its objections to the election, Respondent alleged that the union:

- (1) Induced employees to vote for it by promising them
 - (a) back overtime pay alleged due;
 - (b) jobs in Las Vegas, Nevada, or in California;
 - (c) it would prevent Respondent from cutting the stage crew to less than its present complement of twelve men.

(2) Threatened to blacklist employees and prevent them from obtaining employment elsewhere under Union jurisdiction if they did not vote for the Union; and

(3) Waived its rules with respect to taking tests, paying initiation fees and other requirements and issued membership cards in the union to the employees on the condition that they vote for the union.

In its objections (1) and (2), Respondent identified the agents of the union engaged in such conduct as John A. Forde and Bob Wetherill.

An ex parte investigation was conducted by the Regional Director. On November 15, 1963, he issued his report on Respondent's objections. (GCX 2(e))

With respect to objection 1(a), the Regional Director reported that his investigation disclosed no evidence in support of this objection "other than purported conversations between rank and file employees which were reported to management officials." He did report there was evidence that the matter of overtime was discussed by officials of the Petitioner (Union) as an issue to be negotiated in the event the union was selected as the collective bargaining agent." However, he concluded that there was no evidence that "any union official promised to seek payment for back overtime as a condition of voting for the union, or otherwise."

With respect to objections 1(b) and (c), the Regional Director reported that Respondent presented evidence in support of said objections through conversations between rank and file employees with other employees but he stated that there was no evidence of such promises by officials or agents of the union.

With respect to objection 2, he reported that there was no evidence in support of this objection.

With respect to objection 3, the Regional Director reported that there was no evidence in support thereof. He

reported the investigation disclosed that no requirements regarding tests, initiation fees or other conditions of membership were in fact waived, although in some cases fees were arranged to be paid on installment which were in no way contingent upon voting for the union.

He further concluded that the objections did not raise substantial or material issues of fact and recommended that the Board overrule them and certify the Union as the collective bargaining agent.

Respondent filed with the Board timely exceptions to the Regional Director's report on objections and a brief in support of such exceptions. (GCX 2(f), RX 2 (rejected)) In its brief in support of exceptions, Respondent argued that the objections raised substantial and material issues of fact which, at a minimum, required a hearing.

In its *per curiam* decision and certification of representatives dated February 27, 1964, the Board adopted the findings and recommendations of the Regional Director. The evidence upon which the Regional Director relied was not before the Board. The Board in a footnote states: "The employer's exceptions raises [sic] no issues warranting a reversal of the Regional Director's findings." (GCX 2(g))

At the hearing before the Trial Examiner in the present matter, Respondent requested that the General Counsel produce all the affidavits taken by the Regional Director during the ex parte investigation of Respondent's objections to the election. (Tr. 5-6, 12-14) The General Counsel refused to produce on the grounds that Respondent was attempting to relitigate the representation case in an unfair labor practice proceeding. (Tr. 6-8, 14-15) Respondent pointed out to the Trial Examiner that the Trial Examiner was not bound by the Board's decision and that he himself could determine whether or not the objections raised sub-

stantial and material factual issues warranting a hearing. (Tr. 10) The Trial Examiner stated that he did not know whether he had "the authority to override what the Board has done" . . . that his hands would be tied" (Tr. 10); he was inclined to the view that he could not relitigate matters in the representation proceedings (Tr. 12); that he didn't think he could "set aside their [the Board's] decision which resulted in the certification of the Union and a decision supporting the Regional Director." (Tr. 13)

As a consequence, Respondent offered in evidence affidavits in its possession which had been furnished to the Regional Director in support of its objections: Charles Morrow, RX 1(a); Robert J. Stirling, RX 1(b); Morton G. King, RX 1(c); Jacques A. Vogt, RX 1(d); Richard W. Lusiani, RX 1(e); Robert I. Brigham, RX 1(f). The Trial Examiner rejected these affidavits on the theory that he did "not have the authority to relitigate in the Complaint proceedings the issues that were properly before the Board in the representation case, and culminating in a decision by the Board in a direction of an election in 20-RC-5597." (Tr. 15)

Respondent then requested special permission of the Board to appeal from the Trial Examiner's ruling rejecting the affidavits proffered by Respondent, refusing to require the General Counsel to produce the affidavits demanded, and refusing to permit Respondent to litigate the issue of whether the Board should have set aside the election or at a minimum granted a hearing on the objections (R. 16, GCX 4(a)) In support thereof, Respondent filed a brief with the Board. By telegram, the Board denied this request. (R. 18, GCX 4(d))

Near the close of the hearing, the General Counsel finally submitted to Respondent the affidavits taken by the Re-

gional Director during the *ex parte* investigation of the objections. These, too, were offered by Respondent but rejected by the Trial Examiner for the same reasons initially given. (Tr. 1344-1346; RX 52 A-K)

In his decision, the Trial Examiner held that the objections "have already been considered and ruled upon by the Board", and that he was bound by the Board's determination. (R. 48, n. 4; R. 54, lines 36-47) Respondent excepted to this. (R. 69) In its Decision and Order, the Board affirmed the Trial Examiner. (R. 84)

B. The Evidence Which Warranted Setting Aside the Election or at a Minimum Required a Hearing.

1. OBJECTION 1(a).

In support of Objection 1(a) Respondent offered the affidavit of Justice L. Morrow, a kitchen steward for Respondent, an employee not in the unit and without any interest in the outcome of the election, and Robert I. Brigham, Director of Industrial Relations for Respondent. Morrow recounted a conversation with Larry Helderbrand, during which "Helderbrand said if we 'go union we will get all our back overtime pay' . . . Helderbrand did say that 'the union guaranteed' the foregoing 'if we go union.' . . . Helderbrand said, 'We have a written statement that is notarized . . . and we will get our back overtime . . .'" (RX 1(a); RX 52H) Brigham's affidavit tells of a conversation he had with Morrow during which Morrow repeated the substance of what Helderbrand told Morrow concerning the claimed overtime pay. In addition, a fact which is ignored by the Board in its brief, Brigham's affidavit explains that no overtime pay was due the employees. (RX 1(f))

The fallacy of the Board's position is readily apparent from its argument. As Respondent pointed out to the Board

in its brief in support of exceptions to the Regional Director's report on objections (RX 2 (rejected)), there were but a small number of employees in the unit involved—twelve in number. Union representatives had no problem contacting them and did so frequently for the purpose of influencing their votes. Indeed, Robert H. Wetherill was not only an employee in the unit, but also business representative for the Union. In his affidavit, Wetherill admits telling the employees “that the issue of backpay for overtime was something the Union, if it won the election, would negotiate about.” (RX 52K) The Regional Director made no finding, nor could he, that there was or is back overtime pay due the employees.

Helderbrand, in his affidavit, did admit telling Morrow “that if the Union got in we would get the pay that was coming to us.” Helderbrand did not deny telling Morrow that he had a written statement that was notarized and that they would get their back overtime. (RX 52C)

Thus, it is readily apparent, contrary to the terse conclusion of the Regional Director and the Board, based on this recitation alone, that there were substantial and material issues of fact that could best be resolved by a hearing. What the Board overlooks in its brief, as this Court must realize, is that the substantial and material issues of fact were resolved by the Regional Director by an *ex parte* crediting of witnesses. Respondent does not know whom the Regional Director or the Board chose to believe. However, in reading the Board's brief, at page 39, we must now assume that the Board is telling the Court that it chose to believe the statement of Helderbrand.

In *NLRB v. Capital Bakers, Inc.*, (C.A. 3, 1965) 351 F.2d 45, 50, the Court said:

“... Yet all of the evidence upon which he [the Regional Director] relied is derived from statements which were not subject to cross-examination or confrontation or to any legal test for determining their use or weight as evidence.”

At page 51, the Court continued :

“... We are not concerned with the question of whether or not the evidence considered by the Regional Director is sufficient to support his finding, or whether the rejected evidence of respondent would overcome the findings; we are solely concerned with the fact that the offer and the findings raise a substantial conflict of fact which the Board's Rules and Regulations require to be determined by a hearing. If this was not apparent to the Board at any prior stage it became clearly apparent at the Trial Examiner's hearing. The circumstances compelled a hearing, at the very least, at this stage.”

We have the statement of Wetherill, a representative of the union, that he told the employees that if the union won the election, the issue of backpay for overtime was something the union would negotiate about (RX 52K) Helderbrand admits that he did say if the Union got in they would get the pay that was coming to them. (RX 52C) Respondent wonders, as well might this Court, whether after a fair and impartial hearing with the opportunity to cross examine witnesses, if in fact this objection would not have been substantiated. For is not the word, “promise” the ultimate fact to be determined after an impartial hearing? One thing seems clear, the union did make promises, no matter how one looks at what was said, in order to influence and induce the employees to vote for the union.

In his report, the Regional Director, notwithstanding the affidavits of Wetherill and Helderbrand, found that

there was no evidence in support of objection 1(a), "other than purported conversations between rank and file employees which were reported to management officials." This contention found little favor in a recent decision by the United States Court of Appeals for the Fifth Circuit,—*Home Town Foods, Inc. v. NLRB* (1967) 379 F.2d 241, 244—which said:

"we are not impressed with the argument that all coercive acts must be shown to be attributable to the union itself, rather than to the rank and file of its supporters. As the Board has once said, 'The important fact is that such conditions existed and that a free election is hereby rendered impossible.' *Diamond State Poultry Co.*, 1953, 107 N.L.R.B. 3, 6."

In this instance, the Regional Director and the Board obviously ignored the Board's own approach towards representation elections as expressed in *General Shoe Corp.*, (1948) 77 NLRB 124, 126, where the Board stated that its function in election proceedings was to provide a laboratory in which an experiment may be conducted under conditions as nearly ideal as possible to determine the uninhibited desires of the employees.

As further stated by the Court in *Home Town Foods, Inc. v. NLRB*, *supra*, at page 244:

"We are also of the opinion that substantial and material factual issues exist which make it necessary that the employer be given a hearing and an opportunity to establish his charges, including cross examination of the witnesses for the union. One of the important issues is the effect of the election and pre-election practices of union supporters on the minds of the voters. The Courts have usually applied an objective test to determine whether interference with an election is sufficient to set it aside."

Also, *NLRB v. Trancoa Chemical Corporation*, (C.A. 1, 1962) 303 F.2d 456, 461.

2. OBJECTION 1(b).

Objection 1(b) was based upon the affidavits of Morrow and Morton G. King, a sound technician for Respondent. Morrow stated that Helderbrand said, "the union guaranteed that if they lost their job here, the union would put them to work the next day in Las Vegas, or California, or some TV station. . . . 'The union guaranteed' the foregoing 'if we go union.' . . . 'We have a written statement that is notarized—if we lose our job, we are guaranteed a job in Las Vegas or California or some TV station.'" (RX 1(a); RX 52H) Stage hand, Paul Jordan, told King that if anything happened to the crew at Harrah's, "We've got a job in Vegas." (RX 1(c))

Here again, although there is a conflict in the testimony, the Regional Director and the Board chose to credit the denials of Helderbrand and Jordan. (Br. pp. 40-41) This was done although Jordan in his affidavit, upon whom the Regional Director and the Board apparently relied, states: "We were told that if we wanted or had to leave Harrah's there was work available in Las Vegas." (RX 52E) The Regional Director's ostensible reason for recommending this objection be overruled was that there was "no evidence of promises of jobs in other areas by agents or officials of the petitioner." But see: *Home Town Foods, Inc. v. NLRB*, *supra*.

Neither the Regional Director nor the Board deigned to comment upon the affidavit of Technician Supervisor Jacques A. Vogt, a former member of other locals of the Union, wherein he stated:

"The craft is controlled by the union and unless you are a member it is almost impossible to go to work . . . In so far as membership in IATSE is concerned, it is a closed shop. It is a father-son deal or if you know someone who is influential in the union and he intro-

duces you, you may get in. This union is in exclusive control of the hiring halls and you get your jobs solely through the halls." (RX 1(d))

3. OBJECTION 1(c).

Objection 1(c) is based upon the affidavits of Brigham, Morrow, and Food and Beverage Warehouse Supervisor Robert Stirling. Morrow stated that he was told by Helderbrand, "it is a cinch that none of us will lose our jobs now that the union is voted in." (RX 1(a); RX 52H) Brigham corroborated the information furnished to him by Morrow concerning Helderbrand's statements. Two or more other technicians, whose names Brigham could not recall, informed Brigham that the crew could not be cut and the union would see that it was maintained at twelve (12) men. (RX 1(f)) Stirling said that Paul Jordan told him the union said to him "that now he wouldn't have to worry about getting fired, we're protected." Asked by Stirling what was meant by protection, Jordan explained that the union said "that they couldn't be bumped from their jobs at Harrah's because seniority was based on length of membership in the local and even if a union member (who had been an IATSE member for a time longer than any of Harrah's employees) came in, he still couldn't bump them." (RX 1(b))

The Regional Director did not find that the above statements were not made, but he concluded that this objection, as were the others mentioned above, was "based upon alleged statements made by rank and file employees to other employees." (GCX 2(e), p. 2)

The Board in its brief to this Court goes even further. It argues that even though these statements were made, it does not chose to believe the witnesses presented by Re-

spondent because in its omnipotence it chooses to believe the union's witnesses. (Br. pp. 41-42) The sworn statements of Respondent's witnesses were taken by Board agents. Certainly, credibility raises a substantial and material issue of fact which cannot be resolved without a hearing. Particularly in view of the fact that although denying he had been promised by any union representative that if he voted for the union the union would guarantee Respondent would not be allowed to cut the stage crew, Jordan admitted that "this was discussed by the union as an item to negotiate about." (RX 52E)

4. OBJECTION 2.

Objection 2 is based upon the affidavits of Vogt and Brigham. Vogt stated he was told by Cole "that it was fine to have an education in a stage hand's job and to be able to work at the stage hand's job, but if you should ever leave Harrah's where else could you go to work. The craft is controlled by the union and unless you are a member it's almost impossible to go to work." (RX 1(d)) Brigham stated he was told by Ponts that "he had to vote for the union because he couldn't get a job anywhere else in this business without a card." (RX 1(f)) Brigham also stated he was told by Lovelady that "he had been convinced that he couldn't get any work anywhere in show business without an IATSE card." (RX 1(f))

The Regional Director found that there was no evidence to support this objection. (GCX 2(e), p. 3) The Board itself however, in its brief is caught on the horns of a dilemma. Until the General Counsel finally produced the affidavits of Cole, Lovelady and Ponts, Respondent had no knowledge of either their admissions or denials. The Board cannot honestly state there was no evidence to support this

objection. Instead, the Board in substance contends that an issue of credibility was raised and it chose to believe Cole, Lovelady and Ponts. (Br. pp. 42-43) This, in face of the fact that Cole admitted in his affidavit he told Vogt he voted for the union for a variety of reasons, "among which was the reason that I realized that Harrah's was probably the only place in the country that I could work without an IATSE card and some day I might want to work somewhere else and implied I would like to be an IATSE member." (RX 52B) Further, Ponts in his affidavit states, "It is and has been my feeling and view that in the theatre business—stage employees—you can't get a job without an IATSE card and you can't get an IATSE card without a stagehand's job." (RX 52J) From whom could Cole and Ponts derive such feeling and views if not the union? Could Respondent demonstrate any more clearly a substantial and material issue of fact that can only be resolved by a hearing?

5. OBJECTION 3.

Objection 3 is based upon the affidavit of entertainment manager Richard W. Lusiani (Dick Lane). Jordan told Lane that he had paid \$61.00 for a union membership card, but that "Bob Wetherill had kept them [cards]], he hadn't given them to them yet." Lane stated that he inferred "from what Jordan said that the cards had been held in the union's possession pending the outcome of the election." (RX 1(e))

The Regional Director reported that the investigation disclosed "that no requirements regarding tests, initiation fees or other conditions of membership were in fact waived, although in some cases fees were arranged to be made by installment." (GCX 2(e), p. 3) The Regional Director did

not report that examinations were given. Neither does he refer to the fact that membership cards were issued in the names of the employees, but held by the union pending the outcome of the election. Neither does he report that this was not a fact. His report is completely silent on this.

The importance of possessing a membership card in the union was emphasized with sledge hammer effect by the union. The union had pointed out the necessity for membership in the union if the employees were to continue in the industry and wanted to work in other areas. They would have to be "a union member to work" in the industry elsewhere and it would be a good thing to have a union card. (Affidavit of Vogt, RX 1(d)) It had been made clear to the employees that seniority in the industry was based on *length of membership in the union* and not length of service for an employer. (Affidavits of Lane, RX 1(e); Stirling, RX 1(b))

Although the union's initiation fee was \$100, membership cards were issued in the names of the employees for a down payment of \$25, the remainder to be paid *after* the election. (Affidavits of Cole, RX 52B; Himinez, RX 52D; Jordan, RX 52E; Lovelady, RX 52G; Murray, RX 52I; Ponts, RX 52J; Wetherill, RX 52K)

Is there not here again present a substantial and material issue of fact? Had a hearing been held, in all probability it could have been demonstrated by cross-examination that the union waived its own rules and issued membership cards to the employees, for less than the full initiation fee, conditioned on their voting for the union in the election. Once again, however, when a question of credibility is involved, the Board in its brief resolves the question by crediting the *ex parte* statement of pro-union supporters rather than the evidence offered by Respondent. (Br. pp. 43-44)

In sum, had the Board and its agent, the Regional Director, viewed the objections and the statements in support thereof, in a completely objective manner, the conclusion would have been impelled that there were conflicts on material and substantial factual issues which at least, warranted a hearing.

C. The Board's Rules and Regulations and the Court Decisions Require a Hearing.

1. THE 8(a)(5) FINDING CANNOT STAND.

The Board's Rules and Regulations require a post election hearing where substantial and material factual issues exist which can be resolved only after a hearing. Section 102.69(c) and (e), 29 C.F.R. § 102.69(c) and (e).

As stated in *NLRB v. Bata Shoe Company*, (C.A. 4, 1967) 377 F.2d 821, at 825, cert. denied (1967) U.S., 66 LRRM 2370:

"Due process of law demands and the present Rules and Regulations of the Labor Board provide that where there is a substantial and material issue of fact relating to the validity of a representation election that a hearing be conducted *at some stage* of the administrative proceeding before the objecting party's rights can be affected by an enforcement order . . . To borrow the words of Judge Brown, writing for the Fifth Circuit, 'it is clear that § 8(a)(5) orders which rest on crucial factual determinations made after *ex parte* investigations and without a hearing cannot stand.' *NLRB v. Air Control Prods. of St. Petersburg, Inc.*, 335 F.2d 245, 249 . . ."

Respondent is equally aware of the policy of avoiding lengthy and unnecessary hearings to expeditiously resolve questions preliminary to the establishment of the bargaining relationship and of avoiding dilatory tactics by those disappointed in the election returns. Consequently, Respondent

has no cause to disagree with the cases cited in the Board's brief at pages 37-38. "But this policy cannot operate to deprive the employer of a hearing in circumstances where it is entitled thereto." *United States Rubber Company v. NLRB*, (C.A. 5, 1967) 373 F.2d 602, 607.

In *NLRB v. Poinsett Lumber & Mfg. Co.* (C.A. 4, 1955) 221 F.2d 121, 123, the Court said:

"If a hearing had been held and the evidence had been taken and passed upon by the Board in the representation proceeding, the Board would not be required to go into the matter again in the absence of special circumstances showing that it was in the interest of justice that this be done; but the evidence has not been taken nor a hearing accorded the company at any time even though substantial questions affecting the validity of the election had unquestionably been raised by its exceptions. We think that it is entitled to a hearing at some stage of the proceedings so that it may produce the evidence upon which it relies for consideration by the Board and for consideration by this court in proceedings to enforce or set aside the Board's Order."

Similarly, *NLRB v. Lord Baltimore Press, Inc.*, (C.A. 4, 1962) 300 F.2d 671, 674.

The determination of whether substantial and material factual issues have been raised so as to necessitate a hearing is a question of law and ultimately a question for the courts. *NLRB v. Bata Shoe Company, supra*, at page 826.

Certification of the Union by the Board did not irrevocably seal it against review. "Altogether interlocutory—just a step in the enforcement proceedings—it was as a matter of law subject to vacation or revision at any time before the trial of the unfair labor practice complaint became final." *NLRB v. Lord Baltimore Press, Inc., supra*, at 674; *Pittsburg Plate Glass Co. v. NLRB*, (1941) 313 U.S. 146, 162, 61 S. Ct. 908, 917.

D. A Hearing Would Have Supported Respondent's Objections and Required the Election to Be Set Aside.

The material and substantial factual issues raised by Respondent's objections would have been established to the satisfaction of even the Board had a hearing been held. Under the Board's precedents, the promises and inducements set forth in Respondent's objections would have compelled the Board to set aside the election. *Labue Bros.*, 109 NLRB 1182, where the union made a preelection offer of free membership. *N.L.R.B. v. Gilmore Industries, Inc.*, (C.A. 6, 1965) 341 F.2d 240, denying enforcement of the Board's order and holding an election invalid where the union had made a preelection offer to waive the initiation fee in the event it won the election.

The Board has recognized its responsibility in the conduct of elections by pointing out in *Sewell Mfg. Co.*, (1962) 138 NLRB 66, 70 that:

"Our function, as we see it, is to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice."

The Court in *N.L.R.B. v. Gorbea, Perez & Morell, S. en C.* (C.A. 1, 1964) 328 F.2d 679, dealing with whether a union inducement vitiated an election, stated (680):

"The question whether there is interference with the employees' freedom of choice is often subtle and difficult. However, we start with one simplifying principle, avoiding the necessity of making the often impossible determination of its actual impact in the particular instance, that an inducement normally is material if objectively it is likely to have an appreciable effect."

See also *Truck Drivers and Helpers, Local Union 568 v. N.L.R.B.*, (D.C.C.A., 1967) 379 F.2d 137, 145, ftn 15, in which the court citing *Gilmore Industries, Inc.* and *Gorbea, Perez & Morell, S. en. C*, both *supra*, said:

“A union’s promise of benefit may be as disruptive of free choice as a threat, and may exert no less restraining influence on that choice.”

We submit that the inducements and promises of the union, viewed objectively, were likely to and did have an appreciable affect on the employees freedom of choice in the instant case. They also exerted a restraining influence on that choice. It is not essential there be proof that such inducements and promises in fact did affect the employees freedom of choice. The election must be set aside if the inducements and promises were likely to have such effect. *N.L.R.B. v. Gilmore Industries, Inc.* and *N.L.R.B. v. Gorbea, Perez & Morell, S. en C, supra*.

III.

THE LAYOFF OF COLE AND LOVELADY WAS NOT DISCRIMINATORY

A. Respondent's Economy Program.

Cole and Lovelady, members of the stage technicians crew at Respondent's Lake Tahoe operations, were laid off on March 5, 1964. There is no dispute that they were laid off in accordance with seniority. (R. 57, lines 1-3) As we shall show, the lay-offs came as a result of a cost reduction program in which Respondent was engaged.

In May or June, 1962, Respondent engaged the services of a professional management consultant firm to make a study of its operations, its costs, and to make recommendations for improvement and reductions in cost. (Tr. 546, 550-551) Just prior to September, 1962, the consultants

issued their first report and recommendation which resulted in a reorganization. (Tr. 529-530, 554) Subsequently in the latter part of 1963, pursuant to further recommendations of the consultants, Respondent's management committee directed the various departments to reduce personnel and costs. Budgeting for each department was instituted for the first time and wage ratio reports were also instituted and utilized to control costs and reduce personnel. (Tr. 528-530) The wage ratio reports are designed to control and improve efficiency by the measurement of man hours or percent of wages to the volume of sales. (RX 40; Tr. 844-848) Through these wage ratio reports budgets are forecast for each department. These forecasts are reviewed frequently. Those for the productive departments such as gaming are reviewed daily. Those for the non-productive departments such as entertainment are reviewed monthly. (Tr. 1156) They are reviewed to compare the projected man hours with the actual man hour to determine whether to revise the forecasts upward or downward depending on the trend for the fiscal year. (Tr. 1173)

The cost reduction program was concerned with better utilization of personnel and with whether there was over-staffing. (Tr. 1173-1174)

Early in 1963, Respondent began seriously to forecast budgets. Improvements were made in those departments where the most money could be saved at the very outset. The entertainment and advertising departments were the first where immediate savings could be effected. (Tr. 1138-1139, 1149-1150, 1153) As of July, 1963, based on the July, 1963, to June, 1964, forecast, Respondent knew how many shifts would be needed in the entertainment department. (Tr. 1157)

B. The Effect of the Cost Reduction on the Entertainment Department.

Vice-President France testified concerning the re-organization in the various departments under his supervision, including entertainment and advertising as a result of the study by the management consultants. With the introduction of new budgeting methods, the budget for the entertainment department was reduced for the fiscal year 1963-1964 as against the budget of the preceding fiscal year. A further reduction was made in the 1964-1965 budget. France's advertising budget was also substantially reduced during the same periods. (Tr. 944-947)

France instructed the entertainment director that after September, 1963, he was to hold entertainment booked for the lounge at Respondent's Lake Tahoe club to a maximum of four acts. In September, 1963, the acts in the lounge at Tahoe were reduced from seven to four. Whereas in the past, entertainment in the lounge had been on a twenty-four hour basis, it was reduced to a twelve hour period during the week and eighteen hours on weekends. (Tr. 947-948) Similarly, the hours of entertainment at the Reno club were reduced. (Tr. 536-537)

To further economize, France attempted to either eliminate or obtain a less expensive opening act for the South Shore Room. (Tr. 948, 981) Respondent attempted to eliminate the opening act wherever possible, particularly in situations where the show had two "strong" featured performers. (Tr. 980-981) This policy is continuing. France was able to persuade such leading entertainers as Sammy Davis, Jr., Eddie Fisher, Mitzi Gaynor and Kay Starr to eliminate an opening act. He also told featured performers to eliminate new costumes for the chorus line or else to assume the cost for these themselves. (Tr. 1033-1039, 1041-1043)

France further instructed his supervisors that he wanted a more efficient crew, economies effected with respect to the number of personnel in the stage crew, and a reduction in the props used on the stage. (Tr. 949, 952, 986) To further reduce costs, France determined that it was more economical to purchase some scenery used in a production rather than to rent it. (Tr. 951-952) Greater efficiency was effected by purchasing more lights for the stage so that the stage crew would "set up" for the shows faster. (Tr. 951, 987) In November, 1963, the chorus line was reduced in number from sixteen to twelve. This number has fluctuated since then because the size of the chorus line is dependent upon the type of production number. (Tr. 532-533, 949-951, 1001)

Instead of hiring four or five big name entertainers for its lounges as in the past, Respondent engaged only one or two such entertainers and less costly acts for its lounges at both Reno and Tahoe. (Tr. 535-538; 606-607) Previously, productions in the South Shore Room at Tahoe were changed every two weeks. Under the cost reduction program, a production is now carried over from show to show. Lavish sets in this room have also been done away with. (Tr. 537-539)

Another cost reduction was achieved in the entertainment department when Stage Manager Sy Lein was terminated in the latter part of 1963. Arthur Barkow assumed both the position of producer and stage manager until about August, 1964. When Entertainment Director Vincent quit, Lounge Manager Lane assumed the position of entertainment director as well as that of lounge manager. (Tr. 922-925) The consolidation of these jobs resulted in a savings for the period that the stage manager's job was unfilled (Tr. 1043-1044), and a further saving in that Lane was still handling both positions as of the time of the hearing. (Tr. 923-924)

As a result of either eliminating or obtaining a less expensive opening act, in addition to the cost factor, Respondent has been able to save on rehearsals, lighting, cues, and other duties performed by stage technicians. (Tr. 1034-1035)

C. The Facts as to the Layoff of Cole and Lovelady.

1. COLE.

On January 16, 1964, Cole was called into Producer Barkow's office. Director of Entertainment Vincent was also present. As testified by Cole, he was informed a general cutback was taking place throughout Respondent's organization, and since he had the least seniority among the stage technicians, he would be the first to be laid off. He was assured by both Barkow and Vincent that the lay-off had nothing to do with his work and that he would be called back when needed. (R. 56, lines 39-43; Tr. 151-152, 173-174)

Cole requested a Board of Review with respect to his lay-off. The Board of Review met on January 19, 1964. The Board consisted of Assistant Club Manager Clever, Director of Industrial Relations Brigham, and Lovelady, the employee representative. It was the unanimous decision of the Board that Cole had the least seniority and he was the "proper man" to be laid off. (Tr. 733-734) Lovelady corroborated the fact that the Board of Review determined there was no need for Cole's services, that Respondent could do with one less stage technician and that Cole was the lowest man in seniority. (Tr. 71-73)

After being laid off, Cole was recalled a week later for temporary work lasting one day. He was again called back for temporary work on February 7, 1964. He worked for four weeks on that occasion during which he received approximately \$1,000.00. That work ended on March 5, 1964, which was the last time he worked for Respondent. (R. 56, lines 39-48; Tr. 152-154, 166)

2. LOVELADY.

Lovelady was laid off by Producer Barkow on March 5, 1964. This was the same date on which Cole last worked in temporary employment for Respondent. (R. 57, lines 1-3) As Lovelady testified, he was assured by Barkow that the lay-off had nothing to do with his union activities or his ability to handle the job. He was informed by Barkow of the general cutback taking place throughout Respondent's organization. Barkow stated "since you are a low man in seniority you are the next man to go." Lovelady was also informed by Barkow that he would be called back when his services were needed. (Tr. 67-69; 98-99)

After the lay-off, Lovelady was also offered temporary employment on several occasions by Respondent, which he refused. (GCX 5, 6; RX 5; Tr. 83-84; 99-100)

D. The Cost Reduction Program Cut Across All of Respondent's Operations.

As part of its cost reduction drive, in November, 1963, Respondent's management committee discussed closing Respondent's Grand Cafe in Reno. In December, 1963, it was closed. As a result of the closing, some employees were terminated and some were offered jobs in Respondent's Casino Restaurant. (Tr. 531)

In the latter part of 1963, or the first part of 1964, a secretarial and stenographic pool was created for the first time at Respondent's Lake Tahoe operations. This resulted in the termination of some secretaries. (Tr. 531-532, 954)

As previously mentioned, entertainment in the lounge at the Lake Tahoe club was drastically curtailed. This resulted in the termination of cocktail waitresses in the lounge. They are employees of the Food and Beverage Department. (Tr. 606-607)

In the latter part of 1963, the number of automobiles assigned to Respondent's directors was reduced. The number of shifts in the gaming department were reduced. The advertising budget was cut. (Tr. 541-543) This effected a savings in advertising of approximately \$200,000. (R. 56, lines 6-7)

On recommendation of the management consultants, the purchasing department was abolished at Tahoe. In place thereof, Respondent has a senior buyer. This resulted in a reduction of the staff from some six or eight employees to three. The director of this department was transferred from Tahoe to the Reno operations as were one or two of the better employees. Other employees were terminated and not offered other positions. (Tr. 543-544, 600-601) The Trial Examiner neglected to find that one or two employees in this department were, in fact, terminated. (R. 56, lines 14-16)

Pursuant to the recommendations of the management consultants changes were made in food inventories and portion controls. Food stores which was under the purchasing department was placed under the food department at Tahoe. As a result, inventories in food stores were reduced. (Tr. 546-547) The Trial Examiner made no finding on this.

Vice President for Administration, Andreotti, testified that in conformity with the efficiency drive his fiscal 1963-1964 budget was reduced ten per cent. In turn, his fiscal 1964-1965 budget was reduced by ten per cent. (Tr. 633-625, 628) One result of this budgetary reduction was the transfer of the director of gaming from Tahoe to the newly created post of assistant club manager at Reno. The elimination of this position resulted in a savings of \$20,000 a year. (R. 56, lines 16-17; Tr. 627, 654) Cuts were made in the slot

repair department. The number of shifts in the slot repair department were reduced by reducing the workweek from six days to five days. (Tr. 652-653) By the cancellation of expenditures for training films, a savings of \$12,000 was achieved. The Trial Examiner made no finding on this (Tr. 627-628, 633-634)

The Engineering and Construction Department was also reduced during fiscal 1963-1964. One assistant in this department quit and was not replaced. (R. 56, lines 19-21; Tr. 657, 665-666)

In furtherance of the cost reduction drive, supervisors were instructed to supervise for more productive work. Meetings were held with supervisors every two weeks to indoctrinate them in methods for effective productivity. The goal was to increase individual productivity and thus decrease the per unit cost. There was a drastic move instituted to reduce overtime hours throughout the organization. As a result, the Director of Industrial Relations was required to keep a wage ratio sheet for his department which gives the performance goal to be attained. He was not allowed to purchase without a purchase order, or to expend sums above a certain amount for his department without permission from his superior. In addition, he was required to submit to his superior methods for further reducing overhead. (Tr. 703-705, 732-733) There was no finding on this by the Trial Examiner.

As a result of recommendations by the management consultants, the food and beverage departments were merged. The management consultants met with the food and beverage department manager, and analyzed this department. Thereafter, the manager held a meeting with his supervisors and instructed them to cut their crews to a minimum and still render efficient service. Economies were put into effect with the result that in 1964, employees in this depart-

ment were laid off without being offered positions elsewhere in Respondent's organization. These were the scheduling supervisor, the head hostess and the head bus boy. The Trial Examiner referring to the head hostess states "the fate of the head hostess is not disclosed in the record." (R. 56, lines 24-25) If he had read the record carefully, he would have observed there was testimony and documentary evidence that she was terminated as a result of the elimination of her position and she was not offered any other job with Respondent. (RX 43; Tr. 1089-1091) The Trial Examiner further states in referring to the elimination of the three positions, "two of these persons were terminated." (R. 56, lines 23-25) Here again, had he looked at the record he would have found not only testimony but documentary evidence establishing that all three were terminated and none of them were offered other employment by Respondent. (RX 43-45; Tr. 1089-1094)

In Respondent's business office, personnel was reduced a minimum of ten per cent. While this was achieved principally through attrition, two accountants were replaced by lesser paid employees. These accountants were not offered other positions by Respondent. Although the work load in the business office increased and the workweek was reduced, there was no increase in personnel due to improved efficiency under the cost reduction program. (Tr. 1139-1140) The Trial Examiner made no finding on this.

None of these facts were controverted. Yet the Trial Examiner reaches the unwarranted inference that "an effort was apparently made to find other positions for meritorious employees." (R. 56, lines 33-35)

E. The Evidence Supports Respondent's Reason for the Layoffs.

The evidence outlined above demonstrates that the layoffs of Cole and Lovelady were part of a cost reduction in

the entertainment department which was but a part of an organization-wide cutback and cost reduction program. Reorganization, the introduction of budgeting and forecasts, the periodic reviews of actual costs as against forecasts, the periodic reviews of actual manhours as against forecasts, the stressing of economies and increased efficiency, the training of supervisory personnel in management techniques, and the better utilization of personnel were all part of the program. That the program was effective in increasing efficiency and bringing about cost reduction throughout Respondent's organization is shown not only by the testimony of various officials of Respondent, but also by the various exhibits produced at the request of the General Counsel.

The evidence disclosed that the total number of hours worked by the stage technicians during the period January through June, 1964 as compared with the same period in 1963, was reduced by 4293.5 hours. (RX 38A) Overtime hours alone during 1964, January through June, were reduced almost fifty per cent as compared to the same period for 1963. (RX 48A-F) These exhibits are the records upon which exhibit 38A is based.

For obvious reasons, these figures did not satisfy the General Counsel's representative. He requested a comparison of the hours worked by the stage technicians for the period July through December during the years 1963 and 1964. This comparison showed that for this period the total number of hours worked during 1964 was 6062.5 hours less than in 1963. (RX 38B)

Due to increased efficiency as a result of the changes instituted by the new stage manager (Tr. 1281) and the training of stage technicians to qualify them to work on

various types of equipment which they had not been able to do previously (Tr. 1369-1370), Respondent was able to make a total savings of 4293.5 man hours worked in the first six months of 1964, and 6062.5 man hours in the second six months of 1964. (RX 38A-B) Is any further proof required to show that the services of Cole and Lovelady were not needed? To ask the question is to answer it. The new stage manager testified that he found after taking the job that the biggest bulk of the shows in the South Shore Room could be operated with a smaller stage crew than previously. (Tr. 1301)

Because of this training, greater efficiency, less costly production numbers, and reduction of the hours of entertainment, Respondent was not only able to reduce the size of the crew of full time permanent stage technicians, but the remaining crew did not work as many hours as before. For example, stage technician Ponts earned \$938.61 less during the first six months of 1964 than he did in the same period in 1963. (RX 39)

During fiscal 1963-1964, the entertainment department had an actual 19.5 performance factor as against 21.7 for the preceding fiscal year. Thus, there was a reduction in cost for this department in fiscal 1963-1964 as against the preceding year. (RX 53A) Again in fiscal 1964-1965, this department continued to show increased efficiency with lower actual cost as against the forecast. (RX 54)

The Board argues that the lay-offs of Cole and Lovelady were not due to lack of work because, says the Board, after the lay-offs, "the supervisors pulled cues and performed other technicians' work." (Br. 31) Not even the Trial Examiner reached such an unsupported conclusion. The evidence is to the contrary. Stage technician supervisor Vogt

testified that due to increased versatility because of training under the new stage manager and increased efficiency of the stage technicians, he had less cues to pull than he did before the lay-offs. (Tr. 1368-1370) In fact, General Counsel's witness Helderbrand contradicted the Board's theory. He testified on direct examination that supervisors only pulled cues when there was a temporary lack of sufficient personnel. As he put it, this was "not very often." He also testified that this situation prevailed even before the lay-offs. (Tr. 407-408)

It is rather interesting and characteristic of the General Counsel and the Board's case to observe that despite the plethora of charts, records and documents demanded by the General Counsel and produced by Respondent which went into evidence, the Board's brief makes no reference to them. This is understandable. They destroy the General Counsel's and the Board's theory.

IV.

RESPONDENT PROPERLY ENFORCED ITS POLICY WITH RESPECT TO TOKES FROM ENTERTAINERS

A. The Policy and the Withdrawal of Tokes.

Respondent's policy regarding tokes was contained in a booklet "You & Your Job", published in June, 1963, and distributed to all employees. The policy read as follows:

"If you maintain Harrah's high standards of sincere friendliness, courtesy and cheerfulness, you will find that a number of *customers* will appreciate your attitude to the extent that you will be offered a gratuity, tip or 'toke'. These are acceptable and we are pleased to see you receive them if offered under the above circumstances." (RX 32, pp. 19-20; Tr. 692, 761; emphasis supplied)

Entertainers and featured performers appearing at the South Shore Room are under contract with Respondent. (Tr. 765-766) Director of industrial relations Brigham testified that gratuities, known in this industry as "tokens" are acceptable from customers of Respondent, but not from non-customers who are getting paid for a service rendered to Respondent. (Tr. 691)

In October or November, 1963, Brigham was advised by entertainment director Vincent of discontent and strong feeling among the stage crew concerning a large token of about \$800 ostensibly received by Stage Manager Lein which was not distributed among the stage crew, but which instead was used by Lein to buy a jeep for himself. (Tr. 693-694, 753-754) Vice-president of public relations France, confirmed the fact that there had been a "squabble" among the stage technicians in a belief that Lein had kept the \$800 for himself. (Tr. 1040-1041) The particular production at the time was the musical, "Flower Drum Song", which had its own stage manager. It developed that in addition to performing his regular duties for Respondent, Lein was performing special tasks outside his regular duties, such as passing out the weekly checks and doing other things for the cast of this particular production. (Tr. 1040) In view of these extra duties for the cast of "Flower Drum Song", the \$800 received by Lein was not a token at all, but payment for such extra work. (Tr. 1063-1064)

Brigham discussed the matter of tokens with Lounge Supervisor Stevens who told him that it was not customary for entertainers to give tokens. Stevens emphasized the fact that it was his experience that employees who received tokens tended to govern their attitude toward the performer by the amount given. (Tr. 755, 757)

This policy of Respondent against the acceptance of tokens from persons doing contractual work for Respondent was not a new policy. It applied to all of its departments, including the entertainment department. A memorandum dated October 1, 1962, posted to the attention of all chauffeurs of Respondent, stated that it is "strictly against" Respondent's policy for any chauffeur to accept tokens from entertainers . . . violation . . . is cause for termination." (RX 42) Brigham was aware of this memorandum as well as the fact that chauffeur Rudd had been terminated in mid-1963 for violation of this policy. (Tr. 696-697, 757-760)

About December 23, 1963, to reemphasize its policy to the stage technicians, Respondent posted a notice on the bulletin board to their attention that since there had been some friction or dissension among them on the matter of tokens, they were not to be accepted, and if they were, disciplinary action would be taken. (R. 47, lines 24-29)

In addition to other reasons, Lein was terminated by Respondent because of the discontent among the stage technicians over the supposition that he had pocketed for himself a large token. (R. 52, lines 32-35; Tr. 753-754)

Again to reemphasize the policy of Respondent and to make it crystal clear, a paragraph was added to the section regarding "tipping" in the revised edition of "You & Your Job" which issued in early 1964 to all employees in all departments. This read:

"When a service is performed not for a customer, but for someone doing contractual work for Harrah's and when Harrah's pays the employee specifically for performing such service, no token may be accepted by the employee performing such service." (RX 33, pp. 24-25; Tr. 694-695, 761)

As mentioned, this policy is not new or unusual as applied to the entertainment department. Brigham testified

and was corroborated by France, that a former entertainment director (Hall) had been terminated for his partiality in purchasing entertainment from particular booking agencies. (Tr. 778, 967-968) In 1960 or 1961, entertainer Tony Martin, upon completing his engagement in the South Shore Room, left four or five inscribed expensive watches with Hall for distribution to supervisors in the entertainment department. Hall was instructed by France to return the watches to Martin, which Hall did. Upon returning to Los Angeles, Martin sent the watches back. Upon instructions from Respondent's president, William Harrah, the watches were taken to a pawn shop and the money received from them was donated to a charity. (Tr. 968-970)

B. Contrary to the Board, Respondent's Policy Applied to All Departments.

1. THE TRIAL EXAMINER'S INTERPRETATION OF THE POLICY REQUIRED A FINDING OF NO VIOLATION OF THE ACT.

The Trial Examiner stated that the "publication only indirectly suggests that tokens from other than customers are outside the scope of the policy statement." (R. 51, lines 37-38) Perhaps the Trial Examiner could have more lucidly described this policy, but this is not his function. The interesting fact is that neither the Trial Examiner nor the Board found that Respondent had no policy against the acceptance of such tokens. If the publication suggests, as the Trial Examiner found, that tokens are acceptable only from customers, he should have found, as the evidence conclusively demonstrates, that tokens from other than customers were not acceptable.

Although the Trial Examiner found that the publication indirectly suggests that tokens other than from customers were not acceptable, the Board in its brief goes further. It now flatly states that nothing in the quoted language "can

reasonably be read to prohibit stage technicians from receiving tokens from performers. The handbook is simply silent on the point." (Br. p. 22) It then argues that the clarifying paragraph in the new edition of the handbook, *supra*, was inserted solely as a device to bar stage technicians from receiving tokens. (Br. p. 22, RX 33, pp. 24-25) Nothing could be further from the truth. Nothing in the record supports the Board's argument.

The Board also argues that significantly none of Respondent's employees outside the unit who customarily received tokens, such as dealers, bartenders, waiters and waitresses were forbidden to receive them. (Br. p. 20) The simple and direct answer is that dealers, bartenders, waiters, and waitresses perform services for customers. Tokens from customers were not prohibited. Those tokens were permitted. Tokens are not acceptable from non-customers who are getting paid for a service pursuant to contract. (RX 32, pp. 19-20; Tr. 691)

As mentioned, "You & Your Job" was distributed to employees of Respondent throughout the organization. The policy applied throughout its organization and was not specifically directed at the entertainment department or the stage technicians. For example, the engineering department enters into contracts with construction firms, the purchasing department enters into contracts; the advertising department enters into contracts; and the industrial relations department enters into contracts for group insurance. None of the employees in any of these departments are allowed to receive tokens. (Tr. 766-767)

Industrial relations director Brigham had to admonish an employee who had administered the group insurance plan, for accepting a wardrobe from the insurance agency. This incident occurred about six or nine months before the individual became Brigham's secretary. When he learned

about it, he spoke to her and questioned her as to whether she was familiar with Respondent's policy with respect to tokens, and advised her that any repetition would be cause for termination. He did not terminate her then because of the lapse of time between the event and his knowledge of it. (Tr. 771, 776-778)

France, who has served Respondent in various capacities, testified that he had always been familiar with Respondent's policy against accepting tokens from anyone under contract to Respondent. This has always been the policy of the purchasing department. When he was the credit manager for Respondent, he was familiar with this policy. (Tr. 1023-1025)

The evidence with respect to the policy on tokens throughout Respondent's departments was so overwhelming that the Trial Examiner was forced to concede, "In all other departments . . . the regulations on tipping and tokens as announced in Respondent's second booklet (RX 33, pp. 24-25) have been strictly adhered to both before and after December, 1963." (R. 52, lines 54-56)

C. Respondent Had Good Cause to Remind the Stage Technicians of Its Policy Respecting Tokens.

Respondent had good cause to post the notice to the attention of the stage technicians reiterating its policy concerning tokens. Respondent was concerned about the dissension and friction among them with respect to Lein's alleged impropriety in pocketing a large sum of money without distributing it among them.

The notice itself made no mention of the Union. Indeed, it referred to "dissension" or "friction" among the stage crew. (R. 47, lines 24-29; Tr. 235, 253) After the "Flower Drum Song" engagement ended, a rumor circulated among

the stage crew that Lein had pocketed an amount of money left by this group for the stage crew. In the words of stage technician Murray, the crew felt that this was not a "very gentlemanly" thing for Lein to do. (Tr. 1443-1444)

The Trial Examiner found it "surprising" that no action was taken as a result of the incident involving Lein until a year later. (R. 52, lines 16-17) The Board in its brief, however, admits that Respondent did not learn of this incident until October or November, 1963. (Br. p. 23; R. 52, lines 25-29; Tr. 753-754) The Board argues that there was something devious about Respondent's delay in not posting the notice until December, which oddly enough is but the month following November. (Br. p. 23) The Board conveniently ignores the fact that as a result of this dissension or friction, action was taken by Respondent against Lein, not a unit employee. Lein was terminated. (R. 52, lines 32-35; Tr. 754)

Once again, the Board intrudes into affairs not its own and substitutes its judgment for that of management's. It argues that Respondent should have ignored its own rule regarding toking and dissipated any discontent or unrest among the stage technicians by the simple expedient of telling them the money had not been for them, but for Lein alone. (Br. pp. 23-24) Perhaps Respondent could have done so, but we are not aware that an employer's failure to follow the Board's subsequent unsolicited advice is an unfair labor practice.

1. THE BOARD AND THE TRIAL EXAMINER MAKE UNFOUNDED FINDINGS AND STATEMENTS ON THIS ISSUE.

The Trial Examiner erroneously found that wardrobe mistress Greimeister, not in the bargaining unit, has received tokens since the posting of the notice. (R. p. 52, lines 37-41) The evidence, however, does not warrant such find-

ing. Greimeister received a ring from entertainer Sammy Davis, Jr. with Respondent's permission for the simple reason that she did "extra work" at home for both Davis and his family. (Tr. 926, 937-938, 941) Greimeister's principal function is caring for the chorus line. Any work that she performs for the stars or featured performers is both special and unusual and on her own time. (Tr. 937) That the stars and featured performers at Respondent's South Shore Room are aware of the policy with respect to tokens is indicated by the fact that both "Tony Martin and Connie Haynes have mentioned it to Greimeister. (Tr. 930-931) Contrary to the Trial Examiner's finding and the Board's argument in its brief (Br. p. 10), to Respondent's knowledge, Greimeister has not continued to receive tokens. It developed at the hearing that she had received a check for \$50.00 sent to her at home by Tony Martin since he could not hand it to her at Respondent's premises. (Tr. 930-931)

The Board in its brief contends that Vice-President France admitted there was no rule barring stage technicians from receiving tokens until the notice was posted in December, 1963. (Br. p. 22) The fact is that France testified to the contrary and further that he was not aware that the stage technicians were receiving tokens. (Tr. 972)

The Trial Examiner failed to find whether there was an established practice of tokening stage technicians in the entertainment field. He stated only that there is "evidence both for and against" such a finding. (R. 52, lines 59-61) He should have found that the burden was on the General Counsel to prove there was an established practice of tokening stage technicians, which burden was not carried. The Board in its brief now goes even further and states without any warrant in the record that tokening is the usual practice in the industry. (Br. p. 9)

Stage manager Bushousen, who has been in the entertainment and theatrical industry since 1950, testified there was no established custom or practice in the industry for a featured performer to take the stage crew. Bushousen has worked in legitimate theatres, in television, for the Los Angeles Civic Light Opera, and with touring companies on the road. He has never received tokens since he has been in the business, with the exception of a "couple of times" in the early years of television. This practice in television was stopped after Bushousen returned from military service. He explained the reason it was stopped was because the crews were too big and liberties had been taken with tokens. NBC asked the performers to stop giving tokens to the stage crew. (Tr. 1286-1289) Lovelady admitted that some of the star performers do not take at all. (Tr. 144)

The speciousness of the Trial Examiner's finding is demonstrated by the fact that there was not a scintilla of evidence before him to indicate Respondent prohibited stage technicians from receiving tokens because of their union activities. To reach such a conclusion, he relied on a record and evidence in a prior proceeding which we have discussed. (*infra* V) This led him to suspect "that following the representation election . . . Respondent was looking for some explanation for the fact that all of the stage technicians voted for the Union." (R. 52, lines 19-25) From this false premise he concluded that Respondent's action in prohibiting stage technicians from receiving tokens was "caused by and in retribution for their union activities." (R. 52, lines 49-52)

Interestingly enough, the Trial Examiner found that "Respondent has the right to discontinue this practice, but not as a retribution to the employees because of their union activities." (R. 53, lines 6-8) This places Respondent in a real quandary. It is rightfully entitled to ask, "when can it

effectuate its policy and stop stage technicians from accepting tokens?" Would Respondent be beyond the pale of suspicion if it did it today, a month from now, a year from now? The answer is obvious. This is a function of management and of no concern to the Trial Examiner or the Board. In sum, there is no substantial evidence that Respondent's policy with respect to tokens had anything to do with the union activities of the stage technicians. *Universal Camera Corp. v. NLRB, supra.*

D. The Token Policy Is Not a Bargainable Issue.

1. THEY WERE NOT PART OF WAGES NOR TERMS AND CONDITIONS OF EMPLOYMENT.

The Board has erroneously ordered Respondent to reinstate the token practice "as it existed prior to its discontinuance on December 23, 1963" and that it cease and desist from discontinuing the practice of receiving tokens and make no changes therein "without first discussing and bargaining with the Union on such matters." Assuming, *arguendo*, that Respondent is required to bargain with the union, it is not required to bargain concerning its policy with respect to tokens. (R. 63, lines 54-61; R. 64, lines 1-10; R. 64, lines 38-40; R. 65, lines 1-5; R. 67-68)

Tokens are not a mandatory subject of collective bargaining. Consequently, Respondent was not required to bargain with the union on that matter even if a request therefor had been made. Respondent had no control over the amount of tokens given to its employees. They were not an established part of wages nor any term or condition of employment. Whether a token was given depended upon the generosity of a particular performer, and indeed upon the courtesy extended to the performer by the stage technicians. As stated, some performers do not take at all. Those that do will not necessarily tip all stage technicians the same amount. (Tr.

141-142) Some performers instead of money gave stage technicians gifts such as wallets, cufflinks, cigarette lighters, key chains, tie clips and liquor. (Tr. 144, 163)

In *National L. R. Bd. v. Wooster Div. of B-W Corp.* (1958) 365 U.S. 342, 348-349, 78 S. Ct. 718, 722, a party's obligation to bargain concerning mandatory subjects of collective bargaining was defined as follows:

"... Section 8(a)(5) makes it an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his employees . . .'. Section 8(d) defines collective bargaining as follows:

'(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .' Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment . . .' The duty is *limited to those subjects*, and within that area neither party is legally obligated to yield. * * * As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree." (Emphasis supplied)

See also for example: *NLRB v. Davison*, (C.A. 4, 1963) 318 F.2d, 550, 554; *NLRB v. Hod Carriers, Local 1082*, (C.A. 9, 1967) F.2d, 66 LRRM 2333.

Subsequent to *National L. R. Bd. v. Wooster Div. of B-W Corp.*, *supra*, the Supreme Court made it clear that it was only a refusal to bargain for an employer to make unilateral changes with respect to wages, hour, and other terms and conditions of employment without first consulting a union with which the employer was obligated to bargain. *NLRB v. Katz*, (1962) 369 U.S. 736, 737, 743, 82A S. Ct. 1107, 1108, 1111. In the latter case, the Court found that an employer's unilateral granting of a wage increase, a mandatory subject of collective bargaining under Section 8(d), was a violation of Section 8(a)(5) of the Act. In the instant case, which fact the Board would sweep under the rug, tokens are not a mandatory subject of collective bargaining.

None of the cases relied on by the Board in its brief (Br. pp. 24-25) are in point and do little to aid the Court. Each of the cases relied on by the Board involves action by an employer with respect to mandatory subjects of collective bargaining.¹

In each of the cases relied on by the Board, the gifts or bonuses were given to the employee by the employer,

1. *NLRB v. My Store, Inc.*, (C.A. 7, 1965) 345 F.2d 494, 497, cert. denied, 382 U.S. 927—cutting hours of employment—*NLRB v. Zelrich Company* (C.A. 5, 1965) 344 F.2d 1011, 1013-1014— withholding Christmas bonus; *NLRB v. Citizens Hotel Co.*, (C.A. 5, 1964) 326 F.2d 501, 504-505—discontinuance of Christmas bonus; *NLRB v. Toffenetti Restaurant Company, Inc.*, (C.A. 2, 1962) 311 F.2d 219, 220, cert. denied, 372 U.S. 977—discontinuance of bonus payments and disqualifying union members from participating in profit sharing; *Standard Generator S. Co. v. National Labor Rel. Bd.*, (C.A. 8, 1951) 186 F.2d 606, 607-608—withdrawal of wage increase; *NLRB v. Central Illinois Public Service Company*, (C.A. 7, 1963) 324 F.2d 916, 919—discontinuance of gas discount; *NLRB v. Wonder State Manufacturing Company*, (C.A. 8, 1965) 344 F.2d 210, 213—discontinuance of Christmas bonus; *NLRB v. United States Air Con. Corp.*, (C.A. 6, 1964) 336 F.2d 275, 277—profit sharing and Christmas bonus plans; *NLRB v. Electric Steam Radiator Corporation*, (C.A. 6, 1963) 321 F.2d 733, 736-737—Christmas bonus; *NLRB v. Exchange Parts Company*, (C.A. 5, 1965) 339 F.2d 829, 831—discontinuance of Christmas bonus.

and were tied to the remuneration which the employees received for their work so that in fact they were a part of it and in reality wages. Tokens or gifts were not given to the stage technicians by Respondent, but by performers who were under contract with Respondent. Tokens did not constitute any part of the wages paid to stage technicians. Whether they were given to the stage technicians at all was a matter over which Respondent had no control. It might have been a source of satisfaction to the stage technician to receive a token, but this does not mean that tokens were a part of wages paid by Respondent or any term or condition of employment.

In *W. W. Cross & Co., Inc. v. NLRB*, (C.A. 1, 1949) 174 F.2d 875, 878, it was said:

"... This does not necessarily mean that the word 'wages' as used in the Act covers all satisfactions, pleasures or gratifications arising from employment such as playing on a company baseball team, or attending a company picnic, or belonging to a company social club ...

* * * * *

... we think it can safely be said that the word 'wages' in § 9(a) of the Act embraces within its meaning direct and immediate economic benefits flowing from the employment relationship. And this is as far as we need to go ..."

The question whether gifts by an employer to its own employees constitutes wages or not was succinctly stated in *NLRB v. Wonder State Manufacturing Company*, (C.A. 8, 1965) 344 F.2d 210 at page 213, as follows:

"The rule is that gifts per se—payments which do not constitute compensation for services—are not terms and conditions of employment, and an employer can make or decline to make such payments as he pleases,

but if the gifts or bonuses are so tied to the remuneration which employees received for their work that they were in fact a part of it, they are in reality wages and within the statute. This is a question of fact, and if the Board's finding to that effect is supported by substantial evidence, the finding must be accepted on review."

In concluding in that case that the Board's finding with respect to the Christmas bonus was not supported by substantial evidence on the record considered as a whole, and that the bonus was in fact a gift about which the employer was under no obligation to bargain before discontinuing it, the Court, at page 214, discussed the following factors:

"(1) There was no consistency or regularity in awarding the bonuses . . . ; (2) there was no uniformity in or basis for the amount of the bonus; (3) the bonuses were not tied to the remuneration received by the employees; (4) whether a bonus was paid and the amount thereof depended on the financial condition and ability of respondent."

We shall now apply those same factors to the instant case:

1. There was no consistency or regularity in stage technicians receiving a toke, if at all; (2) there was no uniformity in or basis for the amount of the toke; (3) tokes were not tied to the remuneration received by the stage technicians; (4) whether the stage technicians received a toke or not depended upon the generosity of the performer.

Consequently, Respondent was under no obligation to bargain with the union prior to effectuating its policy and prohibiting stage technicians from receiving tokes from performers and entertainers under contract with it.

E. The Board's Remedy with Respect to Tokes Is Beyond Its Power and Unenforceable.

Additionally, the Trial Examiner found that stage technicians generally receive in excess of \$300 annually in tokes. (R. 51, lines 8-9) This finding has no support in fact since certain entertainers do not toke at all and those that did, did not necessarily give each crew member the same amount. (Tr. 141-142) In addition to money, stage technicians occasionally received other items of value, such as wallets, key chains, cufflinks, cigarette lighters, and liquor. (Tr. 77, 144, 162-163)

The Board has ordered Respondent to, *inter alia*, make the stage technicians whole "for losses of remuneration suffered by them as a result" of Respondent's "discontinuance of this [toke] practice". (R. 63, lines 54-61; R. 64, lines 1-4; R. 68) We question how Respondent can comply with such an order. How could Respondent determine whether an entertainer might toke one stage technician with \$10, another with a wallet, another with a bottle of liquor, others with key chains and cufflinks, or not toke at all. The order itself is unrealistic and unenforceable to say the least.

As stated by this Court in *NLRB v. Flotill Products* (C.A. 9, 1950) 180 F.2d 441, 444:

"The power granted the Board to direct affirmative action is remedial, not punitive . . ."

By such an order the Board has exceeded the scope of its power. Its power as expressed in Section 10(c), 29 U.S.C.A. § 160(c), is "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

In *Republic Steel Corporation v. NLRB*, (1940) 311 U.S. 7, 11-12, 61 S. Ct. 77, 79, the Court said:

"We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative relief is remedial, not punitive. * * * We adhere to that construction."

V.

THE BOARD'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. The Trial Examiner's and the Board's Reliance on Findings in Another Case Was Erroneous and Prejudicial.

No credible evidence of any threats of reprisal or promises of benefit was offered by the General Counsel in support of the complaint. The only evidence introduced by the General Counsel was findings by a Trial Examiner in a prior hearing relating to statements which allegedly were attributed to certain supervisors. Over the objection of Respondent (Tr. 22-29), the General Counsel requested the Trial Examiner to take judicial notice of the findings of another Trial Examiner in Case No. 20-CA-2839, reported at 150 NLRB 1702, enforced, (C.A. 9, 1966) 362 F.2d 425. The Trial Examiner not only did this but used these findings upon which to base his conclusion that Respondent was discriminatorily motivated in laying off Cole and Lovelady and in enforcing its token policy.

We do not desire to unduly burden the Court, however, we think it would be helpful and consume less of the Court's

time, if we quoted from a portion of the transcript bearing on this:

“Mr. Paras: . . . In that decision the Board makes a number of findings, which the General Counsel feels are critical to resolution to a number of the issues presented on this hearing, and because that decision is a decision of the National Labor Relations Board, the General Counsel feels that the Trial Examiner is bound by the findings contained therein, and he draws particular reference to the findings that begin, I believe, on Page 10 of the attached decision of the Trial Examiner, which the Board adopted in toto.

“The reference there is to conversations had by a Mr. Brigham, the Industrial Relations Director for the Respondent herein, and in which I think it would be easier if I just quoted the one paragraph from the decision.” (Tr. p. 22, line 25; p. 23, lines 1-12)

“Mr. Berke: Well, just a moment. I am going to object to this.” (Tr. p. 23, lines 13-14)

“Mr. Paras: . . . I will not enter into an argument with respect to the matters Mr. Berke has raised, but I will join counsel to the extent that we cannot relitigate matters in the prior proceeding, but I suggest the Trial Examiner is bound no matter how Mr. Berke chooses to characterize the decision by the findings made herein by the Board, and it is the General Counsel’s position that it would be improper to relitigate in this proceeding determinations made by another Trial Examiner . . .” (Tr. p. 24, lines 17-25, p. 25, line 1)

“Mr. Paras: I am centering on this because . . . General Counsel will be starting his case with two of the 8(a)(3)’s alleged in his complaint . . . the finding made or rather based thereon forms in part the predicate for the General Counsel’s case with respect to all of the 8(a)(3)’s . . . and for that reason we think that this particular aspect of the decision has unique relevancy, but the whole proceeding itself or the whole decision is relevant to this proceeding, *and indeed*

this proceeding may be considered only in light of that proceeding." (Tr. p. 25, lines 20-25, p. 26, lines 1-5; emphasis supplied)

Other statements in the hearing by the General Counsel's representative also made clear that his case stood or fell on the findings in the prior hearing. For example:

"Mr. Paras: . . . but we call particular attention at this time to the findings made of statements by Mr. Brigham on October 15th and 16th following the Board election, because these statements have unique relevance with respect to the 8(a)(3)'s alleged herein." (Tr. p. 26, lines 23-25, p. 27, lines 1-2)

* * * * *

"... but my point is the General Counsel need not prove again what he has already proven to the satisfaction of the Board in the prior case.

"It would be improper here for the Trial Examiner, with all due respect, to make findings in this case which are contrary to findings which the Board has already made in the prior decision." (Tr. p. 27, lines 6-12)

Again, Respondent objected: "If you are going to adopt in toto the findings suggested by the Counsel for the General Counsel and the Charging Party, I think a grievous error is going to be made." (Tr. p. 29, lines 3-5)

The Trial Examiner in making his ruling to go along with the General Counsel, said:

"I will take judicial notice of the Board's decision and findings in the case of Harrah's Club, reported at 150 NLRB No. 169 . . .

"So, it will not be necessary to relitigate matters which the Board itself has found to have occurred or to have existed." (Tr. p. 29, lines 14-21)

A substantial part of the decision of the Trial Examiner is devoted to quotations of alleged statements by super-

visors and management personnel of Respondent taken from the previous decision. (R. 49, lines 28-34; R. 49, lines 36-53; R. 49, lines 55-60; R. 50, lines 1-5; R. 50, lines 7-19; R. 50, lines 21-29; R. 50, lines 31-44; R. 50, lines 46-50; R. 50, lines 52-59)

The Trial Examiner did not have the witnesses before him in this proceeding to testify to such alleged statements in order to observe their demeanor and to make an objective appraisal of their credibility. Consequently, the Trial Examiner erroneously permitted the alleged findings in the previous case to control his judgment of this case. As a result, he entertained a prejudicial view of this case and all evidence offered by Respondent.

No evidence of anti-union motivation was offered by the General Counsel in this case to support the lay-offs of Cole and Lovelady, the alleged refusal to bargain or Respondent's policy on tokens. However, when the Trial Examiner read the previous decision, he was able to surmise that Respondent in prohibiting stage technicians from accepting tokens "was looking for some explanation for the fact that all of the stage technicians voted for the union." (R. 52, lines 24-25) From this inference, it was apparently easy for the Trial Examiner to then conclude that the Respondent's action "was caused by an in retribution for their (stage technicians) union activity." (R. 52, lines 49-52)

With respect to the lay-offs of Cole and Lovelady, the Trial Examiner, in reliance upon the alleged findings in the previous case, disregarding the evidence offered by Respondent in this case, concluded that Respondent was retaliating against the employees for voting for the Union. (R. 52, lines 28-32) Where lay-offs occurred in other departments, the Trial Examiner without bases or substan-

tiation, as we have shown, inferred that "apparently" an effort was made to find other positions for meritorious employees. (R. 56, lines 34-36) When Cole was offered temporary work a week after his lay-off, the Trial Examiner again without bases or substantiation, concluded that "apparently the need for his services was not carefully considered." (R. 56, lines 45-46) Obviously, he was not only indulging in unwarranted inferences, but was substituting his thinking and managerial expertise for that of management. Although conceding that Respondent was cost conscious, the Trial Examiner was quick to allude to the previous case and conclude that Respondent was also "anti-union conscious." (R. 57, lines 42-45) To support his conclusion that Cole and Lovelady were laid off for union activities, the Trial Examiner again quotes at great length from the alleged findings in the previous case. (R. 57, lines 47-61; R. 58; lines 1-6)

The Board in its brief to the Court, quotes extensively from the decision in the previous case since it has no evidence to rely on in this case. (Br. pp. 4-7) Relying on the previous decision, it argues that Respondent's "openly expressed hostility toward the Union" presents a "*prima facie* case of illegal discrimination . . ." (Br. p. 28) It follows the same boot-strap argument of the Trial Examiner. There being nothing in the instant record to support its argument, the Board refers to the record in the previous case to contend that Respondent's "hostility to the Union evident before the election was now transformed into resentment and vindictiveness towards the stage crew responsible for the Union's victory." (Br. pp. 18-19)

In a vain effort to show some relation to the election and Respondent's policy respecting tokens, the Board in its brief refers to the fact that the notice with respect to tokens was posted to the attention of the stage technicians on

December 23, 1963, "about five weeks" and "a few weeks" after the Regional Director issued his report recommending dismissal of Respondent's objections to the election. (Br. pp. 9, 20) The obvious inference that the Board would have the Court draw is that the Regional Director's report influenced Respondent's "timing" in posting this notice. However, the date is insignificant. The Regional Director's report was not a final action by the Board. Respondent filed exceptions to the Regional Director's report on December 1, 1963. (GCX 2(f)) The Board's decision and certification of representatives did not issue until February 27, 1964. (GCX 2(g); R. 46, lines 53-55; R. 47, lines 1-8)

Such error by the Trial Examiner and the Board has worked substantial prejudice to the rights of Respondent. *NLRB v. Bill Daniels, Inc.* (C.A. 6, 1953) 202 F.2d 579, 586-587, reversed on other grounds, 346 U.S. 918, 74 S. Ct. 305; cf *NLRB v. Johnson*, (C.A. 6, 1962) 310 F.2d 550, 552. In addition, it is contrary to the *Administrative Procedure Act*, Title 5, U.S.C. § 1006(d) recently recodified as 5 U.S.C. § 556(e). As a consequence, there is no substantial probative evidence in this record, independent of the Board's taking judicial notice of another Trial Examiner's findings in a prior case, to support the Board's findings in the instant case. *Universal Camera Corp. v. NLRB*, (1951) 340 U.S. 474, 71 S. Ct. 456.

In *NLRB v. Bill Daniels, Inc.*, *supra*, the Court said:

"It is the general rule that a Court ordinarily will not, either upon its own motion or upon suggestion of counsel, take judicial notice of records, judgments and orders in other and different cases or proceedings, even though such cases may be between the same parties and in relation to the same subject matter."

In its brief in opposition to a petition for a writ of certiorari, in *Winn-Dixie Greenville, Inc. v. N.L.R.B.*,

(1967) S. Ct., the Board during the current session of the United States Supreme Court in referring to the issue raised concerning the Board's reliance on its decisions involving the employer's past conduct to support an unfair labor practice finding, said:

"... although it [history of past conduct] alone could not support an unfair labor practices finding, may be utilized to shed light on other probative evidence."²

Thus, the Board, when faced with the issue in the Supreme Court, recognized the limited use to which prior findings could be put in a current case involving the same employer. In the instant case, there was no "other probative evidence". The sole "evidence" utilized by the Trial Examiner and the Board was the findings of a Trial Examiner in a prior case.

B. Assuming, Arguendo, the Statements Found in the Prior Case Were Made They Do Not Support a Finding of Discrimination in This Case.

Even assuming the statements relied on by the Trial Examiner and the Board were made, they were made so remote in time from the violations alleged herein, that there is no relationship between them.

In *Paramount Cap Manufacturing Company v. NLRB*, (C.A. 8, 1958) 260 F.2d 109, 112, the Court said:

"Hostility toward the Union was not in itself an unfair labor practice and a presumption that such state of mind once proven was presumed to continue did not shift the burden of proving the alleged unfair labor practice but was proper background evidence in this case."

2. For the convenience of the Court we have had the Board's brief in that case reproduced and are filing it with the court simultaneously herewith. See page 7 thereof.

This Court in *NLRB v. Citizens-News Co.*, (C.A. 9, 1943), 134 F. 2d 970, 973, held that "the mere discharge of an employee with or without reason is therefore not evidence of intent to affect labor unions or the rights of employees under the National Labor Relations Act." Similarly, *NLRB v. Late Chevrolet Co.*, (C.A. 8, 1954), 211 F.2d 653, 656; *NLRB v. Falls City Creamery Co.* (C.A. 8, 1953) 207 F.2d 820, 829.

In *NLRB v. Council Manufacturing Corp.* (C.A. 8, 1964), 334 F.2d 161, a plant manager allegedly stated that the owner would close down the plant or automate it "before we have a union here." The Court denying enforcement of the Board's order, said (165):

"We regard this disputed testimony, despite its creditation by the trial examiner and by the Board, and despite its characterization in the Board's brief as 'an obvious violation', as too thin a crust on which to rest anything as serious as an 8(a)(1) violation. We have the impression that the Board of late has tended to overstretch on this type of issue and that, in the light of *Universal Camera*, a foundation of much greater substance is required...."

NLRB v. Johnnie's Poultry Co., (C.A. 8, 1965), 344 F.2d 617, in which the employer is alleged to have said the union would try to organize the plant but he could not afford to pay union wages and would shut down rather than have a union. The court, at 619, held:

"At most, the challenged statement is an isolated incident made in a friendly conversation more than a month before the organizational campaign commenced. We have denied enforcement in similar situations..."

The Trial Examiner piled inference upon inference to find a violation of the Act with respect to the lay-offs and

the token policy. He inferred that it was not necessary, as a part of Respondent's cost reduction program, to make any changes in its entertainment department and in particular to lay off any stage technicians. (R. 57, lines 10-11) Next, the Trial Examiner inferred that Cole and Lovelady, both of whom had the least seniority, were selected among other stage technicians for lay-off because of their union activities. (R. 57, lines 47-53) We submit that such inferences are unwarranted and are no substitute for "substantial evidence on the record considered as a whole". *Universal Camera Corp. v. NLRB, supra; NLRB v. Sebastopol Apple Growers Union*, (C.A. 9, 1959), 269 F.2d 705, 713. There is no substantial evidence on the record considered as a whole that the lay-off of Cole and Lovelady was due to union activities. Indeed there is not a scintilla of evidence in this record that it was due to union activities. To the contrary, the evidence as has been shown, is overwhelmingly that their lay-off was for valid economic and business reasons.

C. Neither the Trial Examiner Nor the Board May Second-Guess Management.

To reach his conclusion, the Trial Examiner had to go beyond the record before him, rely on alleged statements in a previous record, discussed above, and substitute his own business judgment for that of Respondent's.

Contrary to the finding of the Trial Examiner, the lay-off of Cole and Lovelady was not "ordered by top management without consideration of the needs of the department." (R. 57, lines 10-11) The decision to lay off the stage technicians was not made by the vice-president responsible for the entertainment department. The producer, the stage manager, and the entertainment director made the recommendation to him that they could get by with fewer stage hands. He acted upon their recommendation. (Tr. 994-955)

The Trial Examiner was completely mistaken when he said that "France [Vice-President] did not take into account the personnel requirements of the stage crew." (R. 57, lines 18-19)

The evidence of economy moves by Respondent was apparently so overwhelming, the Trial Examiner was compelled to find that "a reduction in the total number of stage technicians would have come about at some point." (R. 58, lines 31-33) However, this finding is directly contrary to and inconsistent with the conclusion that he was endeavoring to reach. Rather than consider the record evidence before him, the Trial Examiner substituted his judgment for the business judgment of Respondent by concluding that any further reduction of stage technicians would have been accomplished by attrition or by the re-assignment of stage technicians to other positions. (R. 58, lines 37-42) There is no evidence to support this conclusion. The evidence discussed previously establishes that there were personnel reductions in other departments not accomplished by attrition or by reassignment.

A further illustration of the substitution by the Trial Examiner of his business judgment for that of Respondent and from this leaping to the conclusion Respondent's actions were discriminatorily motivated, is found in his finding relating to the lay-off of the assistant stage manager. To the Trial Examiner it "seem[ed] a rather inept time to lay off the assistant stage manager . . ." (R. 57, lines 27-31) As this Court said in *NLRB v. Sebastopol Apple Growers Union*, (C.A. 9, 1959), 269 F.2d 705, 713-714:

"The Trial Examiner might have operated the cannery differently. But the respondent had the right to determine for itself how its business was to be conducted. Management may make wise decisions or stupid ones, and it is of no concern of the Board unless they are unlawfully motivated."

Obviously, the Trial Examiner here fell into the same classic error of purporting to evaluate Respondent's actions in terms of reasonableness. The fallacy of this has been repeatedly exposed. *NLRB v. McGahey*, (C.A. 5, 1956), 233 F.2d 406, 412; *NLRB v. Wagner Iron Works*, (C.A. 7, 1955), 220 F.2d 126, 133; *NLRB v. Montgomery Ward & Co.* (C.A. 8, 1946), 157 F.2d 486, 490.

D. The Board Ignores the Applicable Standards of Judicial Review.

These were not the only errors of the Trial Examiner in this respect. We have already noted some of the extreme lengths to which the Trial Examiner and the Board went to ignore evidence that runs counter to their conclusions. The Board's brief reflects this approach and it is not one that lends weight to its findings or that makes the task of the Court easier in exercising its reviewing functions. The Trial Examiner neglected, among other failures of his as we have earlier pointed out, to find as the evidence shows, that under Respondent's cost reduction program, the job of lounge manager was combined with that of entertainment director; that when Ponts quit, both Lovelady and Cole in the order of seniority were offered Ponts' full time permanent job which they refused. (R. 58, lines 42-43)

It is obvious, too, that the Board has ignored certain fundamental legal propositions. The burden is on the General Counsel to prove affirmatively by substantial evidence that a discharge was due to union activities and the employer does not have to prove non-discrimination. As stated in *Indiana Metal Products Corp. v. NLRB*, (C.A. 7, 1953) 202 F.2d 613, 616:

"This burden of the Board to prove discrimination and to prove that discrimination was employed in the hiring or firing of a man because of his union activities does not shift from the Board."

Similarly, *NLRB v. Sebastopol Apple Growers Union*, *supra*, at p. 712.

The controlling case on the scope of review is, of course, *Universal Camera Corp. v. NLRB*, *supra*. Since that decision, the courts have taken the view that it is their "duty to consider not only evidence tending to support the Board's findings but also evidence conflicting therewith."³ "And if it is our duty to consider it then we must pass upon its weight."⁴

While there is no formula for ascertaining substantial evidence, certain principles have developed in addition to the one of considering the evidence on both sides:

(a) Substantial evidence must be more than suspicion.⁵ Typical of suspicion is the Trial Examiner's and the Board's conclusion that the reduction of the stage crew could have been handled by attrition. Yet there was no evidence of any member of the stage crew intending to quit at the time. Another example of suspicion is the timing of the lay-off of the assistant stage manager which the Trial Examiner said was "a rather inept time." (R. 57, lines 27-31; R. 58 lines 37-42)

3. *NLRB v. Gala-Mo Arts, Inc.* (C.A. 8, 1956), 232 F.2d 102, 105; *Osceola Co. Co-op Cream. Ass'n. v. NLRB* (C.A. 8, 1958), 251 F.2d 62, 64; *NLRB v. Englander Company* (C.A. 9, 1958), 260 F.2d 67, 70; *NLRB v. Hart Cotton Mills* (C.A. 4, 1951), 190 F.2d 964, 974-975; *NLRB v. McGahey*, *supra*, 233 F.2d at 413.

4. *United Packinghouse Workers of America, CIO v. NLRB* (C.A. 8, 1954), 210 F.2d 325, 330. Compare *NLRB v. West Point Mfg. Co.* (C.A. 5, 1957), 245 F.2d 783, 786: "In each case it must be established whether the legal or the illegal reason for discharge was the actually motivating one, and if evidence of both is present we must ascertain whether the evidence is at least as reasonably susceptible of the inference of illegal discharge drawn by the Board as it is of the inference of legal discharge."

5. *Universal Camera Corp. v. NLRB*, *supra*, 340 U.S. at 477, 71 S. Ct. at 459.

(b) The pyramiding of inferences does not constitute substantial evidence. Startling illustrations of such pyramiding were discussed *supra*. The whole chain of inferences does not rest on a single piece of evidence. It begins with an assumption, not based on any testimony or any other credible evidence that it was not necessary in connection with its cost reduction program for Respondent to reduce its stage crew, then nimbly leaps to the conclusion that even if it was necessary, it could have been handled by attrition. This, too, without a shred of evidence. Then the great leap is made that *ergo* the lay-offs were for union activity.

(c) "The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as the result of such activities.⁶ And, as the Court said in *NLRB v. McGahey, supra*, 233 F.2d at 413:

"With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inference that an illegal—not a proper—motive was its cause. An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one."

In the instant case there were no discharges. Cole and Lovelady were laid off with the assurance they would be recalled when needed. They were recalled when needed and when offered full time permanent employment refused to accept it. Neither was there any evidence that they were

6. *NLRB v. Citizen News Co.* (C.A. 9, 1943), 134 F.2d 970, 974; *Osceola County Co-op Cream Ass'n v. NLRB, supra*; *NLRB v. Montgomery Ward & Co., supra*.

engaged in union activity at the time of their lay-off. *A fortiori*, *NLRB v. McGahey*, *supra*.

(d) Finally, it is of critical importance to bear in mind that "a finding of 8(a)(1) guilt does not automatically make a discharge an unlawful one or, by supplying a possible motive, allow the Board, without more, to conclude that the act of discharge was illegally inspired."⁷ Here the Trial Examiner and the Board rely heavily and solely on 8(a)(1) findings made by another Trial Examiner in another case. The alleged 8(a)(1) violations in the other case took place many months before the lay-offs. Clearly, the Board has gone far afield to predicate an 8(a)(3) violation on such evidence. Even if there had been 8(a)(1) violations at the time of the lay-offs, such violations could not be relied on to conclude the lay-offs were illegal. The two must be kept separate: "We have frequently sustained 8(a)(1) charges while rejecting those under 8(a)(3)."⁸

The Trial Examiner's emphasis on "timing" to support his conclusion that the lay-offs were discriminatory was succinctly disavowed by this Court in *NLRB v. Citizen-News Co.*, (C.A. 9, 1943) 134 F.2d 970, 974:

"The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as a result of such activities. There must be more than this to constitute substantial evidence."

In sum, suspicion by the Trial Examiner that the lay-offs were for union activity is no substitute for substantial evidence. As the Court enunciated in *NLRB v. Citizens-News Co.*, *supra* (at 974):

7. *NLRB v. McGahey*, *supra*, 233 F.2d at 410, and cases there cited.

8. *NLRB v. McGahey*, *supra*, 233 F.2d at 410, and cases there cited.

“Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding.”

In the very recent case of *Crawford Mfg. Co. v. NLRB* (C.A. 4, Oct. 27, 1967) F.2d, 66 LRRM 2529, the Board was held not warranted in finding a discriminatory lay-off of eight employees the day following arrangements for a consent election. The Court, at 66 LRRM 2530, stated:

“The Board rejects the justification offered by the company, particularly in view of the union sympathies of the men and the anti-union disposition of the employer. However, we see no acceptable basis for this discredit of the company. Its officers testified to the business slump and cited company records in corroboration. We discern no falsification here. Even if mistaken, it was a managerial judgment not impeached as mala fide.”

The Board itself has held, despite a finding of anti-union animus, that an employer did not violate the Act by laying off two employees, even though they were union members, since the lay-offs were compelled by business reasons and the employees were selected on the basis of their low seniority. *H. W. Elson Bottling Co.*, (1965) 155 NLRB 714.

E. Lovelady Is a Supervisor Within the Meaning of the Act and Therefore Not Entitled to the Protection of the Act.

Assuming, *arguendo*, that the lay-off of Lovelady was because of his union activity, there was no violation of the Act because he is a supervisor within the meaning of Section 2(11) of the Act. A supervisor does not have the protection of the Act. *NLRB v. Fullerton Publishing Company* (C.A. 9, 1960), 283 F.2d 545, 551. The evidence, contrary to the finding of the Trial Examiner (R. 55, lines 33-47), conclusively demonstrates that Lovelady was a supervisor as defined by the Act.

Lovelady testified, on *direct examination*, that in the winter of 1962 or the early spring of 1963, Sy Lein, then stage manager, assembled the entire stage crew and announced that from that time forward Lovelady was "assistant stage manager" and that the stage crew should "act accordingly". He also testified that as assistant stage manager he supervised "to a degree the other stage hands." (Tr. 50-52, 92-93) Lovelady was given a pay raise at this time and occupied this position until his layoff. (Tr. 50, 52, 92) Here again, the Trial Examiner neglected to make these findings, although he was quick to conclude that the contention Lovelady was a supervisor was "without merit." (R. 55, lines 33-48)

As assistant stage manager, Lovelady supervised approximately nine stage technicians. He relieved Stage Manager Lein during his day off, and at other periods when he was absent, at which times he had the complete authority of the stage manager with the exception that he could not sign time slips. When Lein left at night Lovelady was in sole authority over the crew. (Tr. 92-95) In addition, he scheduled the days off for other stage technicians, gave orders and instructions to stage technicians in the performance of their duties, assigned stage technicians their cues, prepared cue sheets used by both himself and the stage manager to give cues to the stage technicians, and made "strikes" for the closing of a show and the opening of a new show. (Tr. 50-53, 92-95, 135-137)⁹ Lovelady understood at the time he was made assistant manager that the stage crew was to respect his orders and instructions. (Tr. 93)

9. A "strike" means tearing down one scene in a show in order to get ready for a new scene and setting up the new scene. Lovelady also testified that he and the stage manager would determine how the strike "would be done and let the crew know how they would do it." (Tr. 52).

It is evident, based upon Lovelady's own testimony, that he had the authority to responsibly direct the stage technicians working under him. It is axiomatic that under the Act an individual need have only one of the powers described in Section 2(11) to be a supervisor even though he satisfied none of the other criteria.

Research Designing Service, Inc. (1963), 141 NLRB 211, 213, where the Board although finding the individuals involved had no authority to hire, discharge or effectively recommend such action, found they were supervisors in assigning men to jobs, and held "an individual to be a supervisor within the meaning of the Act need have only one of the indicia of a supervisor enumerated in Section 2(11) of the Act." Similarly, *NLRB v. Edward G. Budd Mfg. Co.* (C.A. 6, 1948), 169 F.2d 571, 576, cert. den., 335 U.S. 908, the provisions in Section 2(11) must be construed in the disjunctive; *Ohio Power Co. v. NLRB* (C.A. 6, 1949), 176 F.2d 385, 387. See also *NLRB v. Leland-Gifford Co.* (C.A. 1, 1952), 200 F.2d 620, 625.

VI.

THE TRIAL EXAMINER, CONTRARY TO THE BOARD, CORRECTLY CONCLUDED THAT COLE AND LOVELADY REJECTED RESPONDENT'S VALID OFFER OF REINSTATEMENT.

A. The Offer to Cole.

After being laid off on January 19, 1964, Cole was recalled for temporary work a week later. He worked for one day. He was again called back to work on that occasion during which he received approximately \$1,000. That work ended on March 5, 1964, which was the last time he worked for Respondent. (R. 56, lines 39-48; Tr. 152-154, 166) Cole was again offered temporary employment on May 7, 1964, which he refused, on the ground that he could not leave steady employment for spasmodic work. (RX 8) He was

again offered employment for two weeks on June 23, 1964. (RX 9) He refused this on the ground that he had steady employment at a higher salary and could not afford to move back to Lake Tahoe for two weeks' work. (RX 10)

When stage hand Ponts resigned from the stage crew on July 1, 1964, and after Lovelady had rejected Respondent's offer of full-time permanent employment, Cole was offered by telegram a full-time permanent position on the stage crew. (RX 11) The telegram read as follows:

"The resignation of Dick Ponts opens full-time position on stage crew. Will you report for work by Sunday, July 5, latest. Please answer via Western Union immediately."

On July 4, Cole sent the following telegram to Respondent (R. 47 n. 3; Tr. 170; RX 12):

"Physically impossible to give three days notice to present employer, lease our home here, move furniture and find apartment in Tahoe in July. Thanks for the offer, but cannot accept at this time. Would need at least four weeks to prepare."

In addition to working in San Francisco, Cole was managing an apartment building that he owned in California at the time. (Tr. 165-166)

The Trial Examiner concluded that Cole did not ask for or indicate he would accept employment in a reasonable period. He found the four week period Cole stated he would need to prepare to be unreasonable and concluded that Cole had rejected Respondent's offer of July 1, 1964. (R. 47, n. 3)

B. The Offer to Lovelady.

After being laid off on March 5, 1964, Lovelady was assured by Respondent that he would be called back when his services were needed. (Tr. 67-69)

Following his layoff, Lovelady received an offer for two weekends' employment by Respondent, which he rejected. (Tr. 82-84) Subsequently, on June 21, Lovelady received another offer of employment by Respondent for two weeks' work commencing June 23. (R. 59; Tr. 81-84; GCX 5) This, too, was rejected by him on the following day giving the reason that his father had passed away, and he must stay in San Diego under the circumstances and concluding, "Do not count on me." (48; Tr. 84-85; GCX 6)

When Ponts resigned, he attempted without success to contact Lovelady to let him know there would be a vacancy due to his quitting. (Tr. 919-920) Upon Ponts' resignation, Respondent, in the order of seniority, first offered Lovelady a full-time position on the stage crew. (R. 48; Tr. 86; 100-101; GCX 7) Respondent's telegram sent on June 26 requested Lovelady to reply by telegram immediately. Lovelady refused the offer by telegram on July 3, 1964, which stated (R. 48, n. 5; Tr. 86-87, 100-101):

"No mention of unconditional reinstatement or back-pay. The answer is no. This reply doesn't in any way forfeit any backpay due me."

Lovelady, who was working in San Francisco at the time, testified that he refused this offer because Respondent was not "making any amendments (sic) or saying they were wrong." (Tr. 100-101) The Trial Examiner found that Lovelady's answer constituted a rejection of a valid offer of reemployment. (R. 48 n.5)

C. The Board's Finding Is Unsupportable.

Differently than the Trial Examiner, the Board did not regard the failure of Cole and Lovelady to request a reasonable extension of the reporting time "as evidence that the proposed reporting dates did not influence their rejection."

tion of these offers". Such inference is unsupported by the record. The Board concedes that the telegrams sent by Respondent to Cole and Lovelady indicated "proposed" reporting dates. (R. 85, n.1) Rather than engage in a dissertation on contract law regarding counter proposals, as the Board suggests, this issue might not be before this Court if Cole did not make an unreasonable request and if Lovelady did not flatly reject Respondent's offer. Neither indicated any desire to return to work for Respondent or thereafter requested reinstatement.

The basis for the Board's holding is not as clear to Respondent as it appears to be to the Board. There is no contention by the Board that the offers were not unconditional and not made in good faith. The argument of the Board appears to be that Cole and Lovelady were not given a reasonable period of time within which to report and hence the offers were invalid.

We shall not dwell at great length on the cases cited by the Board in its brief. (Br. 35-36) They are just not applicable. Only *Fred E. Nelson, etc.*, (1953) 102 NLRB 780, 783 and *Thermoid Co.*, (1950) 90 NLRB 614, 615-616 refer to the time for reporting. In *Nelson*, an employee was given only one day to report for work. The Board found that the offers were not in good faith since the employer by letters, which distorted the facts, attempted to prevent the employees from receiving unemployment compensation. In *Thermoid, supra*, the offer was "conditioned" on the employee returning within four days. Lack of good faith, however, was demonstrated by the fact that the employer advised the employee that the offer was being made since it appeared that he was no longer a member of the union. There is no evidence in the instant case that the offers were not made in good faith by Respondent, and the Board made no finding that there was a lack of good faith.

The Board's brief makes no mention of a host of decisions which support Respondent and the Trial Examiner. In *White Sulphur Springs Company v. NLRB*, (C.A.D.C., 1963) 316 F.2d 410, 415, the Court reversed the Board's finding that the employer held open its offer of reinstatement for "an unreasonably short time". Offers of reinstatement were made to the employees in that case on a Saturday and on the following Monday, with Monday noon being the deadline for acceptance. The Board argued that the offers must as a matter of right be held open until the employee's union decided whether or not they were to be accepted. In reversing the Board, the Court said:

"The law required the employer to do no more than it did on Saturday morning."

* * * * *

"From the beginning Monday noon had been fixed as the deadline for decision. The employer certainly was entitled to know where it stood . . ."

For some unexplained reason, the Board chooses not to bring to the Court's attention previous decisions of its own concerning reporting time. In *Nevada Tank & Casing Co.*, (1961) 131 NLRB 1352, 1353, a written offer to employees to reply or report for work within forty-eight hours was held to be a valid offer of reinstatement. In *Nashville Display Co.*, (1951) 93 NLRB 1310, individual registered letters to laid off employees requesting them to report at the beginning of the next workweek was held a valid offer of reinstatement.

Cole's reply that he would "need at least four weeks to prepare" amply supports the conclusion reached by the Trial Examiner that Cole rejected Respondent's offer made in good faith and that no further offer need be made by Respondent. An unreasonable request by the offeree constitutes a rejection of a valid offer of reinstatement. *V.L.B.*

Hosiery Co., Incorporated, (1952) 99 NLRB 630. It can be as readily and certainly more reasonably, inferred that Cole was influenced to reject Respondent's offer due to the fact that he was working in San Francisco and was managing an apartment building that he owned in California at the time, as for the Board to infer that Cole was influenced by the reporting date. If the offeree would not accept the offer since he had already obtained satisfactory employment, no further offer is necessary even though an invalid condition might have been attached to the offer. *National Labor Rel. Bd. v. L. Ronney & Sons Fur. Mfg. Co.*, (C.A. 9, 1953) 206 F.2d 730, 737-738.

Lovelady's rejection of the offer is more emphatic. He was also gainfully employed in San Francisco at the time he received Respondent's offer. He did not protest that he was not afforded sufficient time to report. Lovelady's rejection of Respondent's offer was conditioned upon the receipt of "back pay" and an "apology". (R. 48; Tr. 100-101) An unconditional offer of reinstatement is not ineffective merely because certain unfair labor practices have not been remedied at the time the offer is made. *Hock & Mandel Jewelers*, (1963) 145 NLRB 435, 436; *Knickerbocker Plastic Co., Inc.*, (1961) 132 NLRB 1209, 1236; *Kitty Clover, Inc.*, (1953) 103 NLRB 1665, 1667.

CONCLUSION

For the reasons stated, we are confident that a review of the whole record and of the applicable law will lead the Court to conclude that the Board's petition for enforcement must be denied. We so urge.

Dated: December 19, 1967.

Respectfully submitted,

SEVERSON, WERSON, BERKE & BULL
NATHAN R. BERKE

By: NATHAN R. BERKE

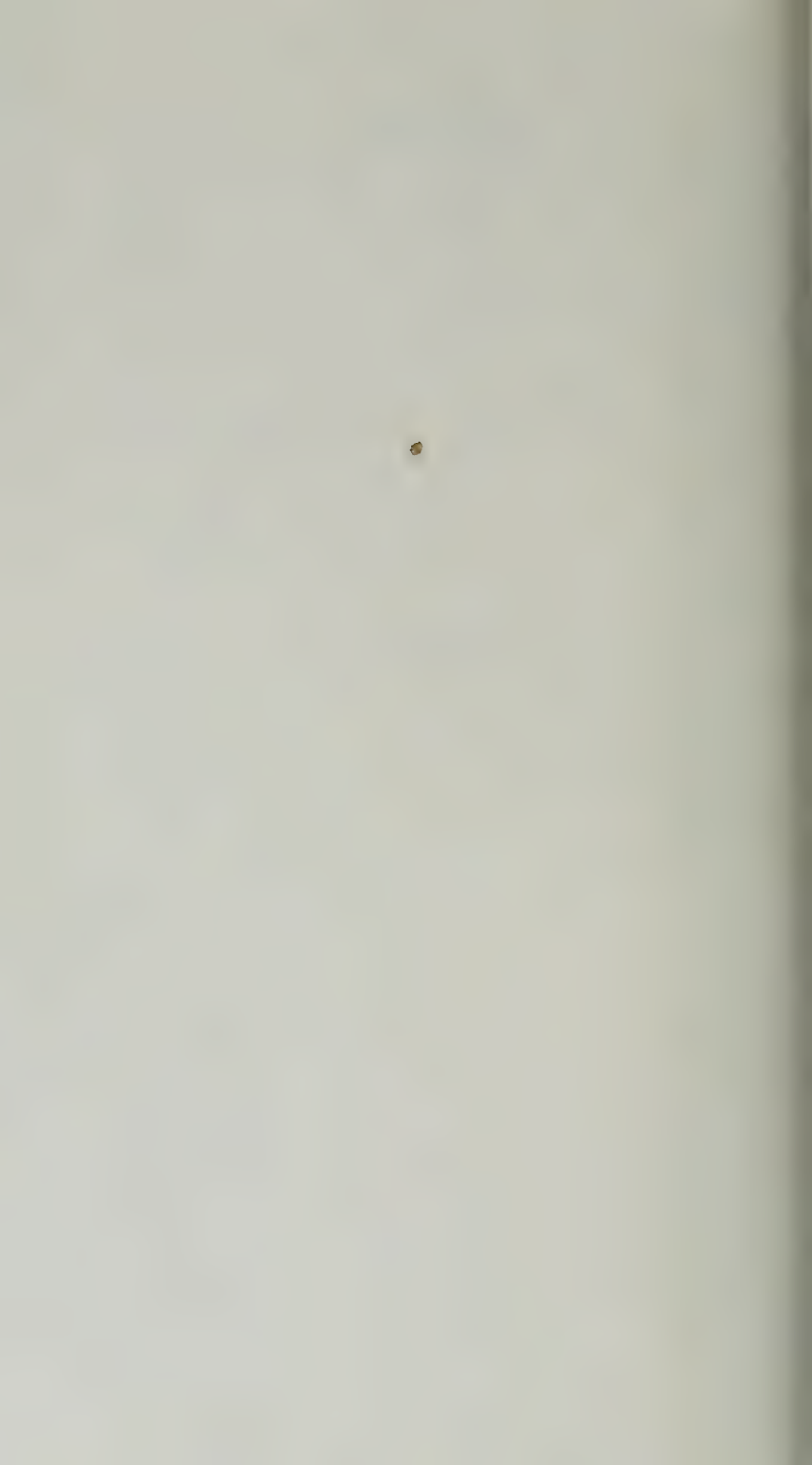
Attorneys for Respondent

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NATHAN R. BERKE

Attorney



No. 21,691 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RUDY L. NOTARO,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the United States District Court
for the District of Nevada**

APPELLEE'S ANSWERING BRIEF

JOSEPH L. WARD,

United States Attorney,

ROBERT S. LINNELL,

Assistant United States Attorney,

305 Post Office Building,

Las Vegas, Nevada,

Attorneys for Appellee.

FILED

JUL 17 1967

WM. B. LUCK, CLERK



Subject Index

	Page
I. Statement of Jurisdictional Facts	1
II. Statement of the Case	2
III. Summary of Argument	5
IV. Argument	5
There Was No Unlawful Entrapment of the Appel- lant as a Matter of Law	5
V. Conclusion	7
Certificate	7

Table of Authorities

Cases

Pages

Glasser v. United States, 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457 (1941)	2, 3
Kaplan v. United States, 9 Cir., 1964, 329 F.2d 561	3
Notaro v. United States, 9 Cir., 1966, 363 F.2d 169, 173 ...	2, 6

Statutes

Title 21, United States Code, Section 176(a)	1
Title 18, United States Code, Section 3231	1
Title 28, United States Code, Section 1921	1

Rules

Federal Rules of Criminal Procedure, Rule 27(a)	1
---	---

No. 21,691

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RUDY L. NOTARO,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the United States District Court
for the District of Nevada**

APPELLEE'S ANSWERING BRIEF

I. STATEMENT OF JURISDICTIONAL FACTS

The indictment herein charged a violation of Title 21, United States Code, Section 176(a), in a single count, an offense against the United States.

Under Title 18, United States Code, Section 3231, United States District Court had original jurisdiction. Upon the Court's verdict of guilty, Appellant was sentenced. It is conceded that this Court has jurisdiction over appeals from such final decisions of a District Court, pursuant to the provisions of Title 28, United States Code, Section 1921, and by virtue of Rule 27(a) of the Federal Rules of Criminal Procedure.

II. STATEMENT OF THE CASE

This is an appeal from the conviction of the Appellant, Rudy L. Notaro, in the United States District Court for the District of Nevada. The indictment upon which the conviction is based charged Appellant with receiving, concealing, selling, and facilitating the transportation, concealment and sale, of approximately three and one-half ounces of marijuana on or about September 9, 1964 (R.05).¹

Appellant had previously been tried on the same indictment, convicted by a jury, and prosecuted an appeal to this Court contending (1) that there was an illegal entrapment and (2) that the trial court erroneously instructed the jury.

This Court determined in connection with that appeal (1) that the jury's determination of the absence of illegal entrapment should not be disturbed and (2) that the jury was erroneously instructed as to the law, and the conviction was reversed and the matter remanded for a new trial. *Notaro v. United States*, 9 Cir., 1966, 363 F.2d 169.

In prosecuting the present appeal, Appellant has specified as error that he should have been acquitted by reason of an unlawful entrapment (Opening Brief, page 6).

At the second trial, Appellant having waived trial by a jury (R.74), the case was tried to the Court. The evidence presented to the Court, when examined in the light most favorable to the Appellee (*Glasser v. United*

¹"R" as used herein refers to the Record on Appeal.

States, 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457 (1941); *Kaplan v. United States*, 9 Cir., 1964, 329 F.2d 561), establishes that an unpaid informant, Harry Midby, had been acquainted with Appellant for several months (T.7)² and that in early September, 1964, he met the Appellant at a restaurant, where the conversation involved marijuana (T.8). Appellant had informed Mr. Midby that he was going into the business of peddling marijuana (T.12), whereupon Midby contacted Detective Albright, of the Clark County Sheriff's Office, who, in turn, introduced the informant to Federal Narcotics Agent Richard Salmi (T.13).

The informant, Midby, told Appellant that he had a friend from out of state that wanted to buy marijuana, and Appellant indicated that he should bring his friend to the Appellant's house late in the afternoon (T.14). On the afternoon of September 9, 1964, the informant accompanied Agent Salmi to Appellant's home where the informant left the car, entered the house and received a small portion of marijuana from the Appellant. Midby showed the sample to Agent Salmi, who had remained outside the residence, and thereafter Appellant indicated that it would be all right for Midby to bring Mr. Salmi into the house. Upon entering, Agent Salmi weighed additional marijuana and after some discussion as to price, purchased, in Midby's presence, several packages of marijuana (Exhibit 4) from the Appellant for \$80.00 (T. 15-18).

²"T" as used herein refers to the Reporter's Transcript of the Trial Proceedings of December 19, 1966.

Agent Salmi testified that Appellant had wanted \$100.00 for the marijuana, but that Appellant finally agreed to accept \$80.00 (T.78,79). Salmi further testified that Appellant told him that he was expecting additional narcotics from Mexico and would later be able to sell him pound quantities (T.79,80).

Appellant testified that he had seen the informant, Midby, at the former's place of work on numerous occasions prior to September of 1964, and that informant had asked him for marijuana (T.126-128); that on each occasion he told the informant that he would not get involved with marijuana (T.130). Further, Appellant denied giving Midby a sample of marijuana to take out to the customer (T.134), and testified that when Agent Salmi and Midby entered his bedroom there was some marijuana on the dresser, but that he did not know how it got there (T.135,143). Appellant admitted, however, that he accepted \$80.00 for this marijuana (T.135).

The Court judged the Appellant to be guilty, and specifically determined that on September 9, 1964, Appellant sold marijuana to Agent Salmi. Further, the Court specifically determined that there was no unlawful entrapment, the thought of selling marijuana having originated with the Appellant. The Court gave no credit whatsoever to Appellant's own testimony (T.151-153).

III. SUMMARY OF ARGUMENT

There was no unlawful entrapment of the Appellant as a matter of law.

IV. ARGUMENT

THERE WAS NO UNLAWFUL ENTRAPMENT OF THE APPELLANT AS A MATTER OF LAW.

The lower Court determined, as to Appellant's defense of entrapment, as follows (T.151-153):

“With respect to the defense of entrapment, which is properly raised in this case, that time element is important, and it is also important that the Court should judge the credibility of the two principal witnesses on that point, Mr. Midby and Mr. Notaro.

“Mr. Midby's testimony was clearly to the effect that the suggestion of engaging in the business of selling narcotics first came from Mr. Notaro. Mr. Notaro, on the other hand, would have us believe that he had no idea whatsoever of trafficking in marijuana until Mr. Midby persuaded him to do so. Whether or not that testimony is true depends on which witness the Court credits, and in view of the testimony of Mr. Notaro that he did not have anything to do with this three and a half ounces of marijuana, didn't have it in his possession, didn't know how it came to be on the dresser in his own bedroom, as opposed to the testimony of Agent Salmi and Detective Albright and Mr. Midby with respect to the precautions that were taken for assurance that Mr. Midby did not have the marijuana in his possession when he entered the house and the bedroom, I just can't believe Mr. Notaro's story.

“If I don’t believe that part of it, there is no reason why I should believe his testimony that he had no intention whatsoever of trafficking in marijuana, but that he was induced and persuaded to do so by the informer.

“I think that Mr. Notaro’s testimony was discredited on a very material point, and that it was the result of a wilful falsehood on his part. For that reason, I do not give credit to any of his testimony.”

The factual and legal issues are substantially as reviewed by this Court in *Notaro v. United States*, 9 Cir. 1966, 363 F.2d 169. In discussing the apparent finding of the jury between the testimony of Mr. Notaro and Mr. Midby, the Court there stated (363 F.2d 173):

“The credibility of each was put in question, and their demeanor and attitude, not observable to us here, was subject to scrutiny by both the judge and jury. When, as here, the result of the trial was so dependent upon the conflicting testimony of two witnesses and when the trial judge refused to disturb the jury’s determination in spite of his own expressed leaning toward an opposite conclusion, we cannot bring ourselves to interfere.”

It is Appellee’s position that the same reasoning applies to the present appeal. On similar, if not identical facts, the trial judge made a determination after judging the testimony of each witness. There was evidence upon which to base his determination, and that determination ought not to be disturbed.

V. CONCLUSION

Based upon the entire record herein and the foregoing arguments, it is the position of the Appellee that the judgment of the District Court should not be disturbed.

Dated, Las Vegas, Nevada,
July 8, 1967.

Respectfully submitted,

JOSEPH L. WARD,

United States Attorney,

ROBERT S. LINNELL,

Assistant United States Attorney,

Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT S. LINNELL,

Assistant United States Attorney,

Attorney for Appellee.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RALPH RICHARD BENSON,

Appellant,

vs.

LELAND C. CARTER, Probation Officer
of Los Angeles County, PEOPLE OF THE
STATE OF CALIFORNIA,

Appellees.

RECEIVED
JUN 17 1968

WM. S. LINDEN, CLERK

NO. 21693

See Vol. 3402

JUN 24 1968

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF AMERICA

APPELLANT'S PETITION FOR REHEARING

RALPH R. BENSON
1680 North Vine Street
Hollywood, California 900
466-7221

DATED: June 14, 1968

Attorney for Himself-
Appellant

FILED
JUN 17 1968

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RALPH RICHARD BENSON,

Appellant,

vs.

LELAND C. CARTER, Probation Officer
of Los Angeles County, PEOPLE OF THE
STATE OF CALIFORNIA,

Appellees.

NO. 21693

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

- - -

APPELLANT'S PETITION FOR REHEARING

TO THE HONORABLE CIRCUIT JUDGES: HAMLEY, KOELSCH and ELY:

Appellant RALPH RICHARD BENSON hereby petitions for a rehearing by this panel or a rehearing en banc to reconsider the judgment entered in this action on May 17, 1968, on the following grounds:

I.

The Ninth Circuit failed to see the constitutional basis of the state Perez decision when it edited a portion of the Perez case (which followed the Supreme Court of the United States ruling in Morrison v. California): "To compel a defendant to admit guilt as a condition to invoking the defense of entrapment would compel him to relieve the prosecution of proving his guilt beyond a reasonable doubt..."

II.

The Ninth Circuit stated that the defense of entrapment in California is based solely on an election of the courts preserving their own purity under supervisory powers, quoting the Benford case. The Ninth Circuit fails to give meaning to the words of the Perez case which said that guilt or innocence of a person entrapped is involved when the disclosure of the informant was "relevant and helpful to the defense of the accused or essential to a fair determination of the cause...when the informer is a material witness on the issue of guilt...and his testimony might have disclosed an entrapment."

III.

The Ninth Circuit refers to the concurring opinions in Sorrells and Sherman. These opinions cannot undermine the majority opinion in the cases which base the defense of entrapment on innocence of the accused which he has a right to be protected under a plea of not guilty. No state or federal court can so undermine, limit or fetter this defense. They cannot overrule a decision of the Supreme Court of the United States.

IV.

The Ninth Circuit states that Benson was not denied due process by his state because California required "an admission of the acts charged. This is incorrect. The law as applied to Benson went further: it required a plea of guilty to all three offenses charged citing Benson's: "consistent denial that the crimes complained of were committed."

V.

The Ninth Circuit states that due process was satisfied by a trial on a defense of lack of scienter although the defense of entrapment was neither heard nor tried (nor waived). This argument is contrary to Hall v

Illinois since the Ninth Circuit now permits fettering and destruction of the defense of entrapment while unconstitutionally permitting a state to elect defenses for an accused and by such election permits a conviction without a trial of an accused by entrapment and frame-up by publicly paid servants and enforcers of the law who went beyond affording an opportunity to commit a crime but lured and deceived the accused and manufactured a crime of their own by their conversations, acts and letters.

VI.

The Ninth Circuit states that the District Court of Appeal held that Benson "denied the acts charged." This is untrue. The record shows that Benson admitted the acts of forwarding the insurance claims. He denied believing the claims were false.

VII.

The Ninth Circuit cites Cox v. Louisiana and Raley v. Ohio yet incorrectly finds these cases do not apply where a state agent without his badge showing makes the same false representations to a person later accused of crime which was manufactured by that state servant. A person has a constitutional right not to be framed, and have his defense of entrapment and frame-up heard in open court whether the policeman had his uniform on or off at the time of the incident.

VIII.

The Ninth Circuit states Benson is on parole. It is untrue. He is on probation.

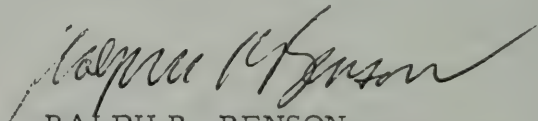
IX

Any state or federal decision which extracts an admission of an act or an admission of the commission of the offense charged as a special

price for having the courts open to a determination of public servants manufacturing a crime so an honest citizen can be put in jail should be stricken down. Any conviction so obtained should be retroactive because justice and a fair trial and the Constitution have been denied and disgrace to an innocent person.

DATED: June 14, 1968.

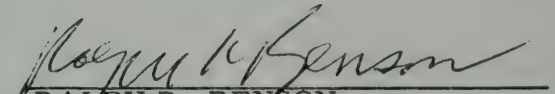
Respectfully submitted,

A handwritten signature in cursive script, reading "Ralph R. Benson". The signature is written in dark ink and is positioned above the printed name.

RALPH R. BENSON
Attorney for Himself-Appellant

CERTIFICATE

Pursuant to Rule 23, I certify that in my judgment the .
foregoing Appellant's Petition for Rehearing is well founded
and that it is not interposed for delay.



RALPH R. BENSON
Attorney for Himself-Appellant

No. 21696 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EUGENIO LOZA-BEDOYA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

PETITIONER'S OPENING BRIEF

FILED

MAY 31 1967

WAL. B. LUCK, CLERK

JOHN F. SHEFFIELD &
NORMAN B. SILVER
412 West Sixth Street
Los Angeles, California 90014

Attorneys for Petitioner

JUN 11 1967

No. 21696

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EUGENIO LOZA-BEDOYA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

PETITIONER'S OPENING BRIEF

JOHN F. SHEFFIELD &
NORMAN B. SILVER
412 West Sixth Street
Los Angeles, California 90014

Attorneys for Petitioner

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	i & ii
STATEMENT OF FACTS	1
SPECIFICATIONS OF ERROR	5
CONCISE ARGUMENT OF THE CASE	7

TABLE OF AUTHORITIES

Cases

Escobedo v. Illinois, 376 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758	16, 18
Gault v. Arizona, Decided U.S. Supt.Ct. May, 1967	22
Massiah v. United States, 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199	16
Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602	16, 17, 18
People v. Ebner, 64 Cal.2d 297, 49 Cal.Rptr. 790, 411 Pac.2d 578	18, 19
People v. McGinnis, 57 Cal.Rptr. 661	19
People v. Shanklin, 243 A.C.A. 94, 52 Cal.Rptr. 28	19
Rose v. Woolwine, 344 Fed.2d 993	7, 9
Sherman v. Immigration & Naturalization Service, 385 U.S. _____, 17 L.Ed.2d 362, 87 S.Ct. 483	20, 21

Tejeda v. United States Immigration & Naturalization Serv., 346 Fed.2d 389	10, 12
Wadman v. Immigration & Naturalization Service, 329 Fed.2d 812	15, 16
Woodby v. Immigration & Naturalization Service, Case #40, October term, 1966, 385 U.S. ___, 17 L.Ed.2d 362, 87 S.Ct. 483	20, 21

Statutes

8 C.F.R. 242.16	12
8 C.F.R. 242.17	12, 14
Immigration & Nationality Act (1917) §3	13, 14
Immigration & Nationality Act §212(a)(31)	4
Immigration & Nationality Act (1952) §212(c)	13, 14
Immigration & Nationality Act (1952) §244(a)(1)	14, 15
Immigration & Nationality Act §1182(a)(31)	3, 6
8 USCA 144	2, 17
8 USCA 1182(a)(31)	22
8 USCA 1251 (a)(2)	8
8 USCA 1251 (a)(5), (1305)	8

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EUGENIO LOZA-BEDOYA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

PETITIONER'S OPENING BRIEF

STATEMENT OF FACTS

This is a petition for review of Order of Deportation.

The petitioner in these proceedings is a native of Mexico, who is married to a United States citizen spouse, and the father of three American citizen children. He is the head of the family and supports five persons besides himself in the United States.

He owns his own home and personal property and is engaged presently in his own business as that of a brick mason - contractor.

Petitioner has resided in the United States since 1944.

In 1951, in San Diego, California, in the United States District Court, Petitioner was convicted after entering his plea of guilty upon the charge of bringing an alien into the United States in violation of then Section 8 USCA 144, which reads as follows:

"Any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise, or shall attempt by himself or through another, to bring into or land in the United States by vessel or otherwise, or shall conceal or harbor or attempt to conceal or harbor, or assist or abet another to conceal or harbor, in any place, including any building, vessel, railway car, conveyance, or vehicle, any alien not duly admitted by an Immigrant Inspector and not lawfully entitled to enter or to reside within the United States, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding \$2,000.00 and by imprisonment for a term not exceeding five years for each and every alien so landed or brought in or attempted to be landed or brought in."

Petitioner has been refused an immigration visa by the American Consul in Nogales, Mexico in August, 1962.

Refusal of the visa was apparently based on the conviction in 1951 in San Diego, California, charging the petitioner with illegally bringing an alien into the United States.

Petitioner is informed and believes that the basis for the refusal of the American Consul to issue him an immigration visa was based on the application of Section 1182 (a) (31) of the Immigration and Nationality Act, which reads as follows:

"(a) Except as otherwise provided in this Chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: . . .

"(31) Any alien who at any time shall have knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter into the United States in violation of law."

Petitioner's residence since 1944 was interrupted by his deportation in July, 1953, after his conviction as aforesaid in the United States District Court of San Diego, California.

He illegally returned about August, 1953 and except for a short visit to Mexico in 1955, and another visit in 1957, maintained his residence in the United States until he was deported on March 8, 1962.

His wife, a United States citizen, residing in the United States, whom he married in 1961, sought her Congressman's help in obtaining legal residence for the Petitioner. In August 1962, the Congressman advised her by telegram to have Petitioner proceed immediately to the American Consulate in Mexico. Petitioner followed the advice and for about the next eight months stayed in Mexico, apparently in hope of obtaining a visa.

The American Consul ultimately denied petitioner's application for a visa, apparently finding that his conviction in 1951 for assisting the unlawful entry of Mexican nationals brought him within Section 212 (a) (31) of the Act which declared him ineligible for the issuance of a visa as it precludes any alien, who for gain, encouraged, induced, assisted, abetted or aided any other alien to enter or to try to enter the United States in violation of law.

The petitioner returned illegally on May 3, 1963 to join his family.

On November 19, 1963, he was convicted for having entered the United States without permission after having been deported. In the present deportation proceedings, petitioner is charged with being deportable as one who entered the United States without inspection on May 3, 1963.

After exhausting all other administrative appeals, Petitioner filed a motion for reconsideration before the

United States Department of Justice, Immigration and Naturalization Service, Board of Immigration Appeals, Washington, D.C.
This motion for reconsideration was denied on March 8, 1967.

SPECIFICATIONS OF ERROR

1. There has been no hearing by the Immigration Service to determine that petitioner is ineligible for a visa by virtue of the fact that he induced an alien and brought an alien into the United States "for gain." The conviction by itself does not show a finding that such act was "for gain," and this issue has never been determined in this case in connection with the proceedings, nor in the trial in which he was convicted.

2. Petitioner is entitled to know in specific detail the basis upon which eligibility is denied and thereafter is to be afforded an opportunity to refute any evidence upon which such ineligibility is predicated.

3. The issue has never been determined whether the petitioner could be accorded discretionary relief of any kind under the law, for petitioner could establish that he had seven years residence in the United States, he was entitled to discretionary relief and there is nothing in the record to establish that issue at any hearing. Petitioner was never advised of his rights at any hearings to apply for discretionary relief, nor

was he advised of his rights in non-technical language of any such applicable provisions of the then existing law. It was the duty of the Special Inquiry Officer to inform the petitioner of his apparent eligibility to apply for any of the benefits enumerated in the seventh provisos of the Act of 1917, and to afford him an opportunity to make application therefor during the hearing.

4. While the deportation hearing is not deemed criminal in nature, the recent cases have determined that it is quasi criminal and, in view of the recent decisions of the United States Supreme Court, the conviction of petitioner in the United States District Court of San Diego is void and cannot be used as a basis for precluding eligibility under the said Section 1182 (a) (31), as no such finding in law now exists.

5. All proceedings should be remanded, including the deportation proceedings, for the petitioner was not afforded his constitutional safeguards under the recent decisions of the United States Supreme Court.

CONCISE ARGUMENT OF THE CASE

This matter must be remanded for further hearing before the Special Inquiry Officer for the purpose of making two definite determinations of fact, which do not appear on the record.

1. The first is the determination of whether the act of smuggling for which petitioner was convicted and entered his plea of guilty involved the further element of "for gain," for if it did not, then the petitioner's exclusion proceedings and hearings and refusal of the immigrant visa based upon this assumed fact are contrary to law and lacking in due process of law in that the Immigration and Naturalization Service failed to give proper interpretation to this Code Section.

2. The second is that the Special Inquiry Officer at the hearing failed to advise the petitioner of any rights by which he could establish eligibility by virtue of the seventh proviso of the Act of 1917.

3. The petitioner is entitled to know upon what basis the Consul denied him eligibility and to be afforded the opportunity to refute such evidence or the interpretation thereof, if erroneously applied.

With respect to this point, this Court should follow the decision and proceed to evidence as held in the case of Rose v. Woolwine, 344 Fed.2d 993, (1965).

Here it was held that the Court could order the review of matters in an immigration proceeding that would not only bear upon the question of deportability, but would have serious consequences so far as the subject visa was concerned.

In the cited case, the petitioner, after deportation proceedings against her had been terminated, left the United States and proceeded to Cuba where she applied to the American Consul for a visa. The visa was denied when the Consul received statements from the former husband and mother-in-law of petitioner, putting into question petitioner's morals. At no time was she allowed to see the charges made against her or given an opportunity to face and cross-examine her accusers.

She underwent an examination by a psychiatrist of her own choosing and received a clean bill of health, but this failed to affect the result -- the visa was still withheld.

Frustrated, this petitioner then resorted to a desperate alternative. She effected a re-entry into the United States in November, 1957, by falsely representing herself to be an American citizen. On October 28, 1963, she was served with an Order to Show Cause why she should not be deported for entering the United States without an inspection, 8 USCA 1251 (a) (2) and failed to file an annual address report, 8 USCA 1251 (a) (5) (1305).

The Court stated at page 996:

"The Act as we have seen, recognizes that more may be at issue in a deportation hearing than the bare question of deportability. Upon the determination of that issue may hang serious consequences which will convert the order of deportation into an effective permanent bar, depriving a person 'of all that makes life worth living.' Ng Fung Ho vs. White, 259 US 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938 (1922). It is in the interest of the United States as well as the alien, indeed it is a service to justice, to allow her to present whatever is pertinent to the allegations reasonably thought to be in the file, and which may affect her right later to seek a visa for re-entry. To deny this - her only opportunity to have procedural due process - and to remit her to the discretionary action of a Consul who may be directly influenced by matters in the file not subject to attack or refutation in a foreign land, where no United States court sits, casts grave doubt on the constitutional adequacy of the deportation proceedings. Such an interpretation is not to be favored."

Rose v. Woolwine, 344 Fed.2d 993 (1965).

We also refer to the case of Tejeda v. United States Immigration and Naturalization Service, 346 Fed.2d 389 (1965) cited by this Court.

This Court said (at page 391):

"In reviewing the administrative record to determine whether any legal cause exists for reversal of the deportation order, we should bear in mind at all times the superior expertise of the administrative agency whose actions we are called upon to review. At the same time, we must forever be on guard against a tendency to abdicate our function and merely rubber stamp the administrative disposition. We are not called upon to substitute our fact-finding powers for those of the agency, but rather to insure against decisions based upon inadequate findings, findings contrary to law, or findings reached without proper regard for prescribed procedural requirements . . ."

Quoting at page 392, this Court further stated:

"We hold that the record before us in this case is insufficient to enable us to determine whether discretionary or mandatory relief is available to petitioner. In particular, we find the administrative record grossly inadequate in its

account of what transpired at the meeting between petitioner and the American Consul for the Philippines in late 1947 or early 1948. Due to the mistaken notion that petitioner did not qualify for non-quota immigration status under 22 USC, Section 1281, both the Special Inquiry Officer and the Board of Immigration Appeals dealt only superficially with the events of that unsuccessful attempt by petitioner to gain readmission to the United States . . ."

And at page 393:

". . . It appears, however, that relief would be available to petitioner under certain possible findings of fact. It is not our function at this stage of the proceedings to speculate on the legal significance of each possible set of findings relating to petitioner's inquiries at Manila. The occasion is not ripe, for example, for this Court to determine the consequences of a factual finding that the Consul merely told petitioner that his re-entry visa had expired, and said nothing more concerning other possible methods of re-entry. Rather, this Court must remand for further findings to determine if any set of facts would give rise to a reversal of the deportation order. We hold that

petitioner would be eligible for relief under at least one set of findings, viz, if it is shown that he was actually and reasonably misled by the affirmative acts and misstatements of the American Consul. To hold to the contrary if this is in fact what transpired, and deny any form of relief from the order of deportation, would result in the punishment of a poorly-educated alien for his reliance on the advice of a presumptively well-informed official of the United States Government. This we would deem improper."

Tejeda v. United States Immigration and Naturalization Service, 346 Fed.2d 389 (1965).

There is nothing in the record of the hearings before the Special Inquiry Officer to establish that at that hearing the petitioner was advised of his rights to apply for discretionary relief, nor was he advised of his rights in non-technical language (8 CFR 242.16 and 242.17).

"The Special Inquiry Officer shall inform the respondent of his apparent eligibility to apply for any of the benefits enumerated in this paragraph, and shall afford him an opportunity to make application therefor during the hearing."
8 CFR 242.17.

The record is entirely silent on this subject. A Special Inquiry Officer in proceedings in 1962, as well as in the current proceedings, was obligated to notify the petitioner of his right to discretionary relief in the form of suspension of deportation, adjustment of status, creation of a record of lawful admission for permanent residence. If the Special Inquiry Officer failed to comply with the Code of Federal Regulations in the above respects, then the deportation proceedings was in violation of the law and regulations.

If the deportation order of March 8, 1962 was invalid, then the petitioner did not depart from the United States under an order of deportation. His residence should have been established under the seventh proviso of Section 3 of the Act of 1917, and made retroactive nunc pro tunc as of 1952.

Under the provisions of Section 212 (c), the petitioner was a returning resident alien, who had not departed from the United States under an order of deportation (See §212(c), Immigration and Nationality Act of 1952).

From the foregoing, therefore, it must appear that petitioner is eligible to have his residence established in the United States under the seventh proviso, as well as under §212(c) of the Immigration and Nationality Act of 1952, if he meets the moral qualifications.

The record establishes that the petitioner is a person of good moral character.

It is therefore contended that on December 23, 1952, petitioner was statutorily eligible to qualify for the relief under the seventh proviso of Section 3 of the Act of 1917. This was his Status, namely, seven years' residence, which was preserved under the savings clause of the Immigration and Nationality Act of 1952. Provisions of this Section may be applied for and invoked nunc pro tunc in the deportation proceedings of March 8, 1962. There is no evidence whatsoever that the petitioner was advised of his rights under the provisions of 8 CFR 242.17. If such residence were to be established prior to his last entry, then he should have his rights to proceedings under §212(c) of the Act of 1952 as a returning lawful resident.

Petitioner in this case also filed application for suspicion of deportation on Form I-256, and this was introduced in evidence as Exhibit No. 3. This application was based upon seven years' residence under §244(a) (1) of the Act of 1952. He has resided continuously in the United States since 1944, and from 1944 to 1950 in Oxnard and in various other places to date.

His departure from the United States in 1953, 1955, 1957 and 1962 were of a casual and unintentional nature.

The petitioner has established good moral character as above stated and the only question to be determined as to his eligibility for suspension is the legal effect of his absences

from the United States. His good moral character was established by the testimony of reputable persons, as well as from church records.

On the occasion wherein the petitioner presented himself to the American Consulate in Nogales, he was requested to do so by a Congressman. He did so with the impression that he would be the recipient of an immigration visa to reside with his wife in the United States.

The application made by petitioner in this case under §244(a) (1) of the Act should be liberally construed according to the Circuit Court of Appeals.

In Wadman v. Immigration and Naturalization Service, (9th Circuit) 329 Fed.2d 812 (1964), at pages 816-817, the Court said:

"In construing Section 244 we are in an area in which strict construction is peculiarly inappropriate. The apparent purpose of the grant of discretion to the Attorney General is to enable that officer to ameliorate hardship and injustice which otherwise would result from a strict and technical application of the law. A strict and technical construction of the language in which this grant of discretion is couched could frustrate its purpose. A liberal construction would not open the door to suspension of

deportation in cases of doubtful merit. It would simply tend to increase the scope of the Attorney General's review and thus his power to act in amelioration of hardship."

Wadman v. Immigration and Naturalization Service,
(9th Circuit) 329 Fed.2d 817 (1964).

Although the petitioner has departed from the United States since his entry in 1944, these departures have been unintentional, without the motive by petitioner to change his residence.

Miranda v. Arizona (1966), 384 US 436, 16 L.Ed 2d 694, 86 S.Ct. 1602, was foreshadowed by two cases in particular. Massiah v. United States (1964), 377 US 201, 12 L.Ed. 2d 246, 84 S.Ct. 1199, which held that under the Sixth Amendment guaranty of an accused's right to the assistance of counsel, the defendant's incriminating statements, elicited by government agents after he had been indicated and in the absence of his retained counsel, were not admissible at his trial.

Escobedo v. Illinois (1964), 378 US 478, 12 L.Ed. 2d 977, 84 S.Ct. 1758, which held that an accused in a state prosecution was denied the assistance of counsel, and that no pre-trial statement elicited by the police during interrogation might be used against him at his trial, where the police investigation, conducted prior to indictment, was no longer a general inquiry into an unsolved crime but had begun to focus on

a particular suspect, the suspect having been taken into police custody, the police carried out a process of interrogation which lent itself to eliciting incriminating statements, the suspect had requested and had been denied an opportunity to consult with his lawyer, and the police had not effectively warned him of his absolute constitutional right to remain silent.

Miranda has now decided that in the absence of a suspect's intelligent waiver of his pertinent constitutional rights, a suspect, prior to any in-custody police questioning, must be warned in clear and unequivocal terms (1) that he has a right to remain silent, (2) that any statement he does make may be used as evidence against him, (3) that he has a right to consult with, and have present prior to and during interrogation, an attorney, either retained or appointed, and (4) that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. Each of these four warnings must be given, it not being sufficient to give some but not all of these warnings.

In view of the fact that the sole basis for the deportation proceedings is predicated on the prior conviction of the petitioner, pursuant to Title 8 USCA 144, the use of this as the basis for his deportation proceedings and the findings thereon could not properly be considered, because of the proceedings leading to that conviction, defendant was apparently deprived of certain constitutional rights when in custody. On

these safeguards the record is absolutely and completely silent.

Following the rules laid down in the Miranda case and in the Escobedo case, supra, when petitioner was taken in custody, he was entitled to the safeguards stated therein.

The record in the San Diego 1951 conviction is absent with respect to the required showing on the factual issues of whether defendant suffered a deprivation of some of his constitutional rights by failure to be warned in clear and unequivocal terms thereof - not some, not any, but all four.

The record shows that petitioner after being taken into custody, was indicated and when he appeared on the second day of July, 1951, for arraignment and plea, he was present in custody and without counsel. The trial court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the Court, whereupon the defendant that he waived the right to the assistance of counsel and entered his plea of guilty.

It should be borne in mind that defendant was an ill-educated immigrant, unfamiliar with the English language, not versed in the same, frightened and unprepared to defend himself, or to be aware of his rights or the effect of waiving counsel.

While we can find no case in point covering a prior felony conviction for a federal offense, attention is nevertheless called to two California cases. People v. Ebner, 64 Cal.2d

297, 49 Cal.Rptr. 790, 411 Pac.2d 578, and People v. McGinnis, 57 Cal.Rptr. 661.

In People v. Ebner this Court held:

"We have held that a prior felony conviction cannot support adjudication of habitual criminality under Penal Code, Section 644 unless in the prior proceedings, defendant was represented by Counsel or intelligently and understandingly waived that right."

In the case of People v. McGinnis, this Court again repeated the rule, especially in cases involving a foreign conviction, to the effect that proof that does not show that the defendant was there represented by counsel, or, that he waived the right thereto, is not sufficient and cites People v. Shanklin, 243 A.C.A. 94, 102, 52 Cal.Rptr. 28, which latter case also held that the trial court must determine whether defendant had been represented by counsel upon former felony conviction, and if not, whether he intelligently and understandingly waived that right.

It is conceded that the Courts have held that deportation proceedings are not criminal in nature. However, the Supreme Court has held that such matters are at lease quasi criminal in nature, as evidenced by the degree of proof now required in such proceedings, as well as statements and considerations to

the effect that the punishment in such proceedings are of a lasting and far greater effect than those which prevail many times in true criminal proceedings.

Our United States Supreme Court in the case of Woodby, Petitioner v. Immigration and Naturalization Service, decided concurrently with Sherman, Petitioner, v. Immigration and Naturalization Service, (October 1966), 385 US ___, 17 L.Ed. 2d 362, 87 S.Ct. 483, held:

" . . . To be sure, a deportation proceeding is not a criminal prosecution. Harrisiades v. Shaughnessy, 342 U.S. 580. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case. This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification. In words apposite to the question before us, we have spoken of 'the solidity of proof that is required for a judgment entailing the consequences of deportation, particularly in the case of an old man who had lived in this country for forty years . . . ' Rowaldt vs.

Perfetto, 355 US 115, 120.

"In denaturalization cases the Court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence. The same burden has been imposed in expiration cases. That standard of proof is no stranger to the civil law.

"No less a burden of proof is appropriate in deportation proceedings. The immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not immediately at least, result in expulsion from our shores. And many resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens.

"We hold that no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true . . ."

Woodby, Petitioner, vs. Immigration and Naturalization Service, decided concurrently with Sherman, Petitioner, vs. Immigration and Naturalization Service, (October 1966) 385 US ___, 17 L. Ed.2d 362, 87 S.Ct. 483.

Attention is called again to the statement of facts in which the "ties" of the petitioner and that of his family are more particularly described and which establish the hardships that would be caused not only to petitioner but to his children and wife in the event that the deportation order was made effective.

Petitioner respectfully urges that not only is the basis for exclusion contrary to law by virtue of an erroneous interpretation of Title 8 USCA 1182(a) (31), but it is erroneous because this prior conviction in the United States District Court in San Diego cannot be invoked as it fails to meet the safeguards announced by the United States Supreme Court. Therefore, the application of said judgment of conviction in the instant case is void.

The United States Supreme Court on May 15, 1967, extended a blanket of constitutional safe-guards to minors when they are tried in Juvenile Courts in the case of Gault v. Arizona, decided May 1967 by the U.S. Sup. Ct.

In establishing the Bill of Rights' protection for juveniles that has been guaranteed adults, the majority opinion (written by Justice Fortas) stated:

"The feature of the juvenile system which its proponents have asserted are of unique benefits will not be impaired by constitutional domestication."

The majority of the Court apparently did not consider nor place any degree of importance on the contention of Justice Stewart, as stated in his dissent, to the effect that juvenile proceedings are not criminal proceedings, are not civil trials nor adversary proceedings but the imposition of a condition rather than a punishment for a criminal act.

The modern trend indicates the development of these safe-guards to situations other than those which are purely criminal in nature.

Our nation's highest military Court has recently ruled that the armed forces must abide by the Supreme Court ban on confessions obtained from defendants who have not been fully advised of their right to a lawyer in overruling the conviction of an airman and ordering a new trial.

Consideration must be given to the lasting effect of the subject order of deportation. If carried out, these results must inevitably ensue.

Petitioner will be deported to Mexico, and under existing laws, can never lawfully return to the United States for residence at any time. Whether he can there make a decent living for himself and his family is doubtful.

But what happens to the wife and children under these circumstances, in addition to this cruel and unusual punishment inflicted on the petitioner, which is the equivalent of banishment for life from the United States.

American children, citizens by birth, a citizen wife, in order to obtain the benefits of the consortium, love and affection, guidance and support of the father and husband and not become public charges, must follow petitioner, and while not legally deprived of their American citizenship, in fact, they too are exiled to a land foreign to them, actually deprived of the benefits in every form of American citizenship and the benefits of living, education and all else afforded to citizens and residents of these United States.

Before these drastic measures are taken and these dire results ensue, every legal and fair consideration should be had to insure that petitioner has been afforded every right and the benefit of all laws and determined rules of procedure.

The matter should therefore be remanded to the Immigration and Naturalization Special Inquiry Officer with instructions to afford petitioner a new hearing on these vital issues, coupled with a record of the entire proceedings with adequate and appropriate findings of fact and conclusions of law and with the hearing to be of such a nature that it is complete in all phases, so that petitioner can cross-examine

witnesses and refute evidence, produce his own witnesses and evidence, so that justice in reality is finally afforded and accomplished.

Respectfully submitted,

JOHN F. SHEFFIELD &
NORMAN B. SILVER

By: John F. Sheffield

Attorneys for Petitioner

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ John F. Sheffield

JOHN F. SHEFFIELD

Attorney for Petitioner

